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MATERIALS ON CONFLICT OF LAWS

Volume I

Professor John Swan

and

Professor Vaughan Black

1987 - 1988

Faculty of Law

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We are grateful for the help that has been given over the years by Alice Ng, who worked on revisions of these materials for thirteen years. That she is now in business for herself may say something about the stamina required in that task. We are also grateful for the help of Nina Lester and of many other students over the past several years in the constant revisions in the organization and text of these materials.

For the first time these materials are showing the results of the work and interest of Professor Vaughan Black of Dalhousie University, who is sharing the task of making these materials ready for publication.

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CONFLICT OF LAWS

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INTRODUCTION

We know that you may be tempted to ignore this introduction: after all it won't be on any exam. Please do not ignore it. We have laboured over it, and in the case of one of us at least, for longer than we care to remember, and it is an attempt to introduce you to an area of the law that is simultaneously very important and very widely misunderstood. It is no exaggeration to say that every one of you who proceeds to the Bar Admission course will have a conflicts problem to deal with as an articled student, and that the extent of the ignorance of the vast majority of lawyers of the topic covered by this course has to be heard to be believed.

We are not so optimistic as to believe that what we have said here is so transparently clear that all your problems in dealing with what follows in these materials will evaporate if you read this introduction. Even if you do not fully understand all that we have said here and if we do not achieve that dream of all teachers, that you will suddenly cry, "Eureka!" on reading this introduction (or these materials) we believe that this introduction will be useful now, and that it may even - perish the thought of extra work! - repay later re-reading.

Introduction...

1. The Questions Central to the Conflict of Laws

In most cases that come before the courts of a province[1] all the facts - or, at least, all the relevant facts - have occurred in that province. When there are relevant facts that have occurred outside the Province, the rules and principles of the Conflict of Laws are used to reach a solution. In other words, the subject matter of the Conflict of Laws consists of cases with geographically complex facts.

Such cases raise three related and interdependent problems:

1. In what circumstances should the presence of geographically complex facts influence the decision of the court before which the plaintiff has brought its claim to take jurisdiction to determine the controversy?

2. What response does (or should) the court make to a claim presented by a party based on a judgment of another court in that party's favour? Does it (or should it) matter if that "foreign"[2] judgment is that

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[1] We refer throughout these materials primarily to provincial courts. The courts of general jurisdiction in Canada are the courts created by each of the provinces under their constitutional power to provide for the administration of justice in the province: Constitution Act, 1867, s. 92(14). We shall examine some of the special problems that arise from the existence of Canadian as opposed to provincial courts, the Supreme Court of Canada and the Federal Court of Canada, but these problems are to a significant extent very different from those facing provincial courts before which almost all the issues which these materials will examine arise.

[2] It is necessary to use the word "foreign" here for there is no neat or concise term to include judgments of other provincial courts and those of courts of truly foreign countries like France, the United Kingdom or the United States of America. The word "extra-territorial" might be a substitute, but it is longer and its connotations are no clearer than those of the word "foreign". Since each province, under the Constitution Act, 1867, enjoys a degree of sovereignty, each may regard the judgment of a court of another province as being in sense a judgment of a court of a foreign sovereign. We shall spend a considerable amount of time in this course disentangling the issues that this apparently simple problem of terminology raises.

of another Canadian court or of a court of a foreign country? Does such a foreign judgment prevent further action in a province (or in Canada) arising out of the same facts? Does the judgment in favour of the plaintiff in the original proceedings give a cause of action to that party before a provincial court so that the foreign judgment can be "transformed" into a judgment of the local court on which a writ of seizure and sale may issue?

3. In what circumstances, if any, should the presence of geographically complex facts induce a court to consider determining the controversy by reference to some other law or rule of decision than that of the province[3] in which the court before which the plaintiff has brought his, her or its claim is situated?

The reason that cases with geographically complex facts present special problems is that in a case that has relevant factual connections with, for example both Ontario and Québec, the presence of non-Ontario facts may justify the decision of the Ontario courts not take jurisdiction to hear the claim presented by the plaintiff. As regards the second question, a plaintiff who, for example, has induced the British Columbia Supreme Court to take jurisdiction in her dispute with an Ontario corporation, and who has obtained from that court a judgment against the Ontario defendant which is unsatisfied, might come before the Ontario High Court with the British Columbia judgment and ask that it be enforced in Ontario. The need for the plaintiff to try this method of getting payment may arise from the fact that the defendant has no assets in British Columbia, but has assets in Ontario which can be seized. Similarly, the third question may suggest an argument that in a case in which there are relevant facts which occurred in both Ontario and Québec the rights of the parties should be determined with reference to Québec law rather than Ontario law because of the presence of non-Ontario facts in the case.

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[3] Again there are terminological problems to be noted. A case brought before the courts of a province, e.g., the Ontario High Court or the Nova Scotia Supreme Court Trial Division, may be decided by reference to Canadian law as opposed to provincial law. The phrase "Canadian law" as used here refers to those largely statutory rules established by the parliament of Canada in the exercise of its powers under the Constitution Act, 1867. We must again note that the existence and jurisdiction of the Federal Court of Canada raises complex and special problems which will be investigated later in these materials.

Introduction...

Any case of any kind may present such kinds of facts. In practice, the approach of a court in Canada to a criminal case where, for example, the crime was committed outside Canada is determined by the Criminal Code. Again, problems of extra-territorial taxation and of administrative regulation are typically resolved by the application of statutory rules which cover all the issues presented to the court, though as we shall see, not all issues are resolved by statutory interpretation and some are within the area of our concern.

The principal scope for the rules and principles of the Conflict of Laws are cases in the private law field - contracts, property, torts, family law, succession, bankruptcy etc. We will see that, while some of the potential problems have been resolved by statute, there remains a large area where solutions can only be found in the approaches developed by the judges.

One focus of this course will be on the methods that the courts have adopted to solve conflicts problems and on the consequences of these methods. At the same time, the area of conflicts has been (and still is), for better or for worse, the preserve of the academics and their writings have had a major impact on the rules that have been developed. We shall examine their contributions carefully.

Some of the terminological problems which arise in describing the focus and issues that we shall discuss have been mentioned. These problems are endemic and ubiquitous, and a large part of our time will be taken up with the difficulties created by loose language and the need to develop very precise arguments about the issues we shall examine.

The term "Conflict of Laws" is itself not free from difficulty. That term is the common rubric in the common law to describe cases that present geographically complex facts. The phrase "conflits des lois" as a french translation is sometimes used in civil[4] law systems, but the more usual phrase in those

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[4] The term "civil law" or "civilian" refers to or connotes systems of law or theories of law derived from the Roman law. Most European systems are part of this tradition, as is the law of Japan. The theoretical differences between the civilian tradition and that of the common law are far larger that the actual differences detectable in the results of the cases. As is common in legal analysis, the similarities are overshadowed by the theoretical differences. Arguments based on the fact that in almost all legal systems commercial cases will usually be decided in nearly identical ways will be seen to be extremely powerful.

systems is "Droit international privé", or its equivalent in the other languages. As a result of the strong civilian tradition in the theory of Conflicts, the phrase "Private International Law" is sometimes used even in the common law. We say, "even in the common law", for the common law has always been strongly xenophobic, and only in Conflicts is there any trace of a significant civilian influence. The common law of contracts, torts, family law, etc., remains almost entirely based on the rules and approaches of the common law, and except where there has been legislative intervention, the roots of the law can be traced back for centuries.

Such arguments largely undercut the significance of the theoretical differences between the two systems of law.

2. Note on the Materials

As is usual in the materials that you see in law school, a large proportion of these materials consists of extracts from judgments. There are a number of reasons that help to explain this fact. The most obvious is the easy access that we have to the judgments of the courts. We shall try to reduce the effect that this fact might have on your attitude to the materials by offering examples of clauses taken from contracts, other kinds of agreements and arrangements that are not based on any agreement to illustrate the work of the solicitor who is planning his or her client's affairs with an eye to the possibility of there being a conflicts problem in the future. It is inevitable that the number of pages taken up with such examples will be far less than the number taken up with extracts from judgments, but we ask you not to underestimate the importance of the planning function of the lawyer and to keep its importance always in mind. We shall also offer examples of legislation that either exists to avoid some problem of the common law of conflicts, or makes use of conflicts rules to achieve its end.

As in every other area of the law you must be wary of the focus on judgments and on the role of the litigator, for it makes the work of the "court-room" lawyer appear to be more important than it really is. We shall always have to consider what lessons the judgments have for the solicitor who is trying to keep his client out of trouble, and especially out of litigation - clients have a most deplorable dislike of getting involved in litigation, an attitude that does nothing for the prosperity of the legal profession. Reading judgments in a effort to plan around the rules that they suggest is both more difficult and more central to the lawyer's function than is the use of judgments as the basis for arguments in a dispute.

In these materials, perhaps more than in many other courses in law school, we shall spend a considerable amount of our time examining the contributions of academics to the development of the law. The role of the academic in the development of both the rules and the theoretical structure of the conflict of laws, and the importance of what the academics have created makes a focus on what they have said of great importance. Consistently with what we have said about the use you should make of judgments, we shall assess the usefulness of the academic contribution to see what guidance that contribution gives to either the barrister or to the solicitor who has to deal with the pressing and mundane problems of clients.

The judgments that we shall examine are almost entirely from courts in common law jurisdictions. The contributions of the

academics are taken exclusively from those writing in the same tradition. This focus is not the result of either chauvinism or xenophobia: it is justified by the simple fact that we have enough to occupy our time with what we have to examine, and a wider focus would only be useful if we could develop an understanding of a fundamentally different concept of law, of the role of the courts in its development, and of rules which are based on political and social ideas that have little relevance to the common law world. The language problem is another difficulty we can do little about. We shall see enough of the rules of civilian jurisdictions to catch a brief glimpse of both the conceptual gulf that often divides us from that world, and the fact that radically different legal regimes will nearly always resolve similar problems in the same way, so that the difference in starting positions frequently means very little in the actual results reached in the cases.

It is hard to know where to look for really useful material to explain the issues and problems of conflicts. As we shall see, any extensive focus on the work of the courts will create problems for any analysis that we might try to develop, for the courts do not have as extensive an experience in this area as they do in areas like contracts, tort or property. In other words, the courts simply do not have to decide that many conflicts cases compared with those in the other areas of the law.

The work of the academics occasionally explains what the courts are doing, but more often, offers extensive criticism of what either the courts or other academics do or say, and suggests solutions which, if adopted by the courts, are frequently flawed, or which are objectionable on more theoretical grounds. In other words, the search for workable and sound rules is very difficult, and both our imagination and legal skills will be tested in the effort to find such rules.

There are a number of reasons for the fact that the courts hear so few conflicts cases, but among the more important is the instinctive horror of most practising lawyers for conflicts issues - perhaps justified and explained by their general ignorance of the area. One result of this feeling is that either a conflicts case, i.e., a case in which the lawyers involved see that there are possibly relevant foreign facts, is not litigated with the result that many potential conflicts cases never get brought before the courts, or if such a case does get litigated, both courts and counsel may conspire to hide the conflicts aspects. Lawyers sometimes simply fail to perceive the conflicts issues in cases they are working on. (Do you remember where the car was rented and the accident occurred in Tilden Rent-a-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.)? The judgment of the Ontario Court of Appeal in that case does not advert to the law of British Columbia on the question of

the defendant's liability, or to the validity of the plaintiff's argument or what, in the context of British Columbia law, either party might have or should be held to have expected. The court makes no attempt to discover what that law might have had to say on the issues it considered: it treats the case as if all the facts had occurred in Ontario.)

Another factor possibly contributing to the relative lack of judicial experience in deciding conflicts cases is the widespread and increasing incidence of arbitration clauses in many international commercial agreements. This lack is, in spite of the appearance to the contrary, and if one can add negative ideas to one another, probably more significant for the English courts than for the Canadian.

Canada has recently adhered to an important international agreement regarding arbitrations, and the provinces are introducing legislation to implement the agreement.[5] One result of this development may be that the number of international arbitrations in this country may increase, and the number of cases brought before the courts may be reduced. It is impossible to discover how many contracts might provide for arbitration. It may be assumed that if an international commercial agreement, e.g., a contract for the international sale of goods or for carriage now provides for arbitration, it will usually provide for arbitration in London, Paris or New York.

There are some international arbitrations in Canada, but very few in comparison within those in the other countries. Some idea of the scale of arbitration in London, for example, is provided by the fact that over 50,000 appointments of arbitrators are made in London each year and over 10,000 awards are given. Another illustration of the same fact is that all but one of the international contracts cases coming before the House of Lords, and reported from [1971] A.C. to [1983] A.C., that involved a dispute between the two parties to the contract, was preceded by arbitration. In contrast, no case before the Federal Court of Canada since its creation in 1972, until 1985 has been preceded by arbitration. The Federal Court is relevant for comparative purposes because many international contracts involve charter-parties and international bills of lading that come within the exclusive jurisdiction of that Court. All of the cases in the

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[5] In Canada the federal government has, under the Constitution Act, 1867, the power to enter into international treaties or agreements. As the current "free trade" debate illustrates, that power may not extend to the enactment of legislation to bring the treaty into effect.

House of Lords would have come before the Federal Court had they been litigated in Canada. (As an added twist, and to illustrate some other problems of conflicts, you might worry about what provincial Arbitration Act would be applicable in an action brought in the Federal Court: there is no federal Arbitration Act and probably no jurisdiction in the federal parliament to enact one.)

There is an International Arbitration Centre in Vancouver financed by the provincial government, though the volume of business that it has done, in spite of its location in one of the most scenically attractive sites in the city, is not yet large. The Ontario government has plans to develop and support a similar centre in Toronto. So far as we are aware, there has been no significant increase in the number of international arbitrations as a result of the federal and provincial legislative changes or other efforts. The arbitration that is about to take place over the agreement for the sale of coal from the Quintette mine in British Columbia to the Japanese steel mills may be the first large-scale international commercial arbitration in this country.

We shall briefly examine the issues in international (and interprovincial) arbitrations later in the materials.

3. The Purpose of the Materials

The purpose of our examination of these materials is to achieve an understanding of the Conflict of Laws. It is worth pausing for a moment to consider what an understanding of Conflicts looks like. In other words, what should you get out of an examination of these materials or of a course on Conflicts? There are two goals that these materials are designed to achieve. The first goal is an understanding of how the law is conventionally organized: What concepts or doctrines are regarded as providing guides? What are the rules applied by the courts?

The second is the more difficult part. We ask now if the rules are truly useful as predictions of what the courts will do. Do the rules mask or obscure the real reasons for the decision? Are there any principles that provide a better basis for understanding what the courts will do or what they should do? An understanding of the second kind is not mere academic fluff from the point of view of the hard-nosed practising lawyer. It provides the only sound basis on which she can advise her client, and often it provides her with the means for rescuing a client from the consequences of thoroughly unsatisfactory doctrine. It provides a basis for an informed and creative sense of what is fair and of what justice consists.

The traditional method of analysis adopted by the Canadian courts has been almost exclusively based on the decisions of English judges and the writings of English academics. This approach, though at times pragmatic in orientation, is heavily characterized by a conceptual analysis. One explanation of such an approach is the influence of civilian theories on English academics. As we have mentioned, the common law usually prides itself on its freedom from the intellectual "pollution" of the civil law, but in Conflicts analysis the civilian influence is as obvious as the prevalence of latin phrases. It will be seen that the traditional approach presents major problems, and ways to avoid these will have to be explored.

One further point requires emphasis. An understanding of Conflicts is no different from an understanding of any other area of the law, in that there is no such thing as a single understanding. In Contracts, for example, a thorough knowledge of Cheshire & Fifoot (M.P. Furmston, Cheshire and Fifoot's Law of Contract, 10th ed., (London: Butterworths, 1981)) could be regarded as an understanding of the law. But a Cheshire & Fifoot understanding is not the same as a Waddams (S.M. Waddams, The Law of Contracts, 2nd ed. (Toronto: Canada Law Book Ltd., 1984)) understanding, and a Waddams understanding is not quite the same

as a Swan & Reiter (J. Swan and B.J. Reiter, Contracts: Cases, Notes & Materials, 3rd ed. (Toronto: Emond Montgomery,1985)) understanding. It can be argued that a Cheshire & Fifoot understanding is an impoverished, inadequate or unhelpful understanding or that a Swan & Reiter understanding is wildly unrealistic and inaccurate. The point to remember is simply that there are different understandings and that each has certain characteristics and, what is more important, that each is based on certain assumptions about law, its purpose in society and the values that it represents. After these have been spelled out, you may conclude that you cannot accept a particular understanding, and that some other is preferable. If, for example, you believe that the law of contracts exists to serve identifiable social values and to give effect to the parties' reasonable expectations, then the Cheshire & Fifoot understanding will probably be unsatisfactory to you, for it is based on a different set of assumptions.

The same variety occurs in what an understanding of Conflicts is. These materials will explore at least two general types of understandings. The conflicts equivalent of the Cheshire & Fifoot understanding in contracts is that of Dicey & Morris (Dicey & Morris, The Conflict of Laws, 10th ed. (London: Stevens, 1980)) and Cheshire (the same person) (Cheshire and North's Private International Law, 10th ed. (London: Butterworths, 1979). (As we have already mentioned, an alternative term for "Conflicts" is "Private International Law": we shall consider some of the implications of the nomenclature later in the course.) A large number of competing understandings are based on, or are developments of the work done by three people in the United States. They are Brainerd Currie, David Cavers and Willis Reese, the Reporter for the Restatement, Second, Conflict of Laws. We shall examine their contributions in detail later in Part B of these materials.

As well as these approaches to conflicts, these materials will seek to develop another which, while owing much to the American scholars who have been mentioned, differs from theirs in significant ways. The features of such an approach will be elaborated in the context of the materials that follow. The governing purposes of such an approach are three:

1. Fairness to the individuals caught up in the toils of the law,

2. Predictively useful rules and methods, and

3. Faithfulness to the values expressed in the division of powers in the Canadian Constitution, and to the demands of a federal system in Canada.

These goals suggest a simultaneous and equal concern for the result in the individual case, and for the development of rules and methods, rules that are not only useful as guidelines for those who must use them, but which are also consistent with the special demands of a country like Canada, where power (especially in the area of private law) is divided among a number of competing provincial "sovereigns". The difference between this approach and that of the Americans is the much more significant emphasis given to the special features of the Canadian federation, particularly the different role played by the Supreme Court of Canada when compared with that of the United States Supreme Court.

Such concerns can easily be seen as involving a direct contradiction. It is often thought that either one has no rules and regards fairness and justice as the dominant or governing goal, or one has rules and one lives with the impact that their application might have on an individual in a concrete case. It is, we believe, very important to deny, and to demonstrate the validity of the denial that such a contradiction exists. Rules have no justification unless their application in the individual case is fair and forwards identifiable social policies. Fairness has no content unless it contributes to the development of predictively useful rules. Never forget that as Holmes said: ("The Path of the Law" (1897), 10 Harv. L. Rev. 457)

> It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV.

In the context of Canadian conflicts we need only exchange "Henry IV" for "the nineteenth century" or "Dicey & Morris".

This is strong language. But remember that Holmes said only that it is revolting to have "no better reason ...". He did not say that the mere fact that the rule is ancient is a reason for rejecting it. Similarly the mere fact that a particular conflicts rule is enshrined in Dicey & Morris does not mean that it is necessarily wrong. What Holmes meant was that no rule justifies its application merely by existing. We must always ask, "Does the application of this rule make sense (forward some identifiable social policy, conduce to fairness, etc.) in the context of this particular case, and in the light of the third of the questions set out above, in the context of the demands of Canadian federalism?" This question is not, and cannot be answered by the ritual incantation of any rule.

We shall be able to postpone the examination of the issues of Canadian federalism until much later in the course. For the

moment we shall focus on the first two questions that were posed, and on the first part of the question that has just been asked.

It is part of the purpose of this course to show you what the courts and academics are now doing in conflicts cases. This is an extremely important part of the course. It is essential to know the basis from which the courts are likely to reason, or, at least, to begin to reason. We start, therefore, by examining in each area of the course the traditional and generally accepted rules. Once these have been explored it is both possible and profitable to explore the issues raised by the cases more fully.

The course materials deal principally with four areas of law in which conflicts problems arise: the substantive areas of contracts, torts, family law, succession and the procedural issues of jurisdiction and the recognition and enforcement of foreign judgments. The problems are by no means limited to these areas, however, and there are many other areas where interesting developments are occurring. These areas include corporate law (for example, securities, anti-trust law, see infra, A. II. Jurisdiction, 5. Some Special Problems.) and commercial law (or more specifically, conflict of laws and the law of international sales, secured transactions, bills of exchange or letters of credit.)

We hope that these materials will help you to come to your own understanding of the theoretical basis for Conflicts and of the nature of a satisfactory method for solving very difficult problems. We do not expect that you will unquestioningly accept the approach that we outline, any more than you would similarly accept any other approach. We do demand of you, however, that you face the need to make a choice between the approaches that you will examine, and that you are prepared to give reasons for your choice. We have tried to give reasons for our choice, and we invite you to tell us if they are unconvincing or otherwise flawed. These materials are the result of our own efforts to come to a satisfactory understanding of the problems we have set for ourselves. We can do no more than invite you to come with us as far as we are able to convince you to go.

4. Note on Uniform Laws

An important recent development that will not, however, be extensively explored in this course, are various proposals to produce an international uniform law on certain topics. It is generally accepted that conflicts problems would disappear if there were uniform rules in all relevant jurisdictions. (The validity and effect of this assumption will be more closely examined later. The automatic acceptance of both the assumption and the desirability of uniform laws is one of the more difficult problems we face in developing our approach to Conflicts.)

There is, of course, uniformity of laws in many areas of the law. In Canada, all the common law provinces have Sales of Goods Acts that are very nearly uniform.[6] Similarly, the Uniform Commercial Code in the United States largely eliminates conflicts problems in those areas where the Code applies. There are places where the Code specifically includes express conflicts rules, and we shall look at some of those more closely later.

More ambitious proposals have led to international conventions dealing with certain specific issues. There is, for example, a convention dealing with the problem of international disputes between the parents over the custody of children: Convention on the Civil Aspects of International Child Abduction to which Canada is a signatory and which is part of the Ontario Children's Law Reform Act, (R.S.O. 1980 c. 68, as amended by S.O. 1982, c. 20, s. 1). There are a variety of these Conventions. They are known as "Hague Conventions" because they are the result of multinational negotiations conducted at the Hague in The Netherlands. An aspect of these negotiations has been the

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[6] Proposals to change the act are unlikely to be implemented by one province without an understanding from each of the others that their acts would be similarly changed. The recommendations of the Ontario Law Reform Commission regarding the Sale of Goods Act were taken up by the Uniform Law Conference of Canada which produced a draft act for enactment by all the provinces that differs from the original Ontario proposal. See Report of the Ontario Law Reform Commission on Sale of Goods, 1979 and Uniform Sale of Goods Act, Proceedings of the Uniform Law Conference of Canada, 1981. The Uniform Law Conference of Canada has had a continuing interest in the problems of the Conflict of Laws and has produced a number of draft acts, some of which have been adopted as solutions to various conflicts problems. See. e.g., the Reciprocal Enforcement of Maintenance Orders Act in its various forms in the Proceedings of the Conference over many years.

effort to draft international uniform rules for sales of goods. These efforts go back to 1930 when the International Institute for the Unification of Private Law (UNIDROIT) began work. In 1964 two conventions were adopted: a Uniform Law on the International Sale of Goods (ULIS) and a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC). Neither Canada nor the United States has signed these conventions. Both conventions have been subject to revision under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). A draft Convention on Contracts for the International Sale of Goods resulting from the work of UNCITRAL was adopted in April, 1980, but Canada has not acceded to it. (The provinces are unwilling to enact any legislation that would be necessary to implement the Convention.) UNIDROIT has remained active in other areas of commercial law.

Apart from these general conventions (which are intended to be of nearly universal application) there are more limited international arrangements based on bi-lateral treaties and other special arrangements. We shall examine a few of these briefly in the material that follows.

Other international organizations whose work has a bearing on some aspects of the conflict of laws include the International Chamber of Commerce. This body has a significant role to play in many international arbitrations. These materials cannot explore these issues in any depth, though as we have already mentioned, we shall briefly consider the impact of some recent developments in international arbitrations. A very recent development that will be explored later is the introduction (through provincial law) of the United Nations Arbitration Convention of 1958, more usually known as the New York Convention on Foreign Arbitral Awards (because the United Nations Headquarters are in New York). The adoption by Canada (accession by Canada to the Convention requires, under the Constitution Act, 1867, the agreement of the provinces to introduce the enabling legislation) may have a significant role both on the incidence of international arbitrations taking place in Canada, and on the general rules for the enforcement of foreign arbitral awards. Legislation has been enacted in all provinces to implement this convention: Foreign Arbitral Awards Act, 1986, S.O. 1986, c. 25, International Commercial Arbitration Act, S.B.C. 1986, c. ** (Bill 20 - 1986).

It is obvious that political and economic organizations like the European Community will have a very significant role to play in many areas of the conflict of laws. Again, we cannot explore these issues here, though one important consequence may be noted. The decision of the United Kingdom to join the European Common Market has had an indirect effect on the development of some of the rules we will be examining. Much British legislation and many English cases are now based on European models rather

than on common law ones, and are of less relevance to Canada and, more generally, to North America. Since a large proportion of Canadian conflicts rules are based on English law, Canadian courts have been accustomed to looking to the English courts for guidance. That source of help is becoming increasingly less useful.

We have mentioned the existence of the Uniform Law Conference of Canada as a body that has a continuing interest in developing solutions to the problems of the Conflict of Laws in Canada. (In its earlier manifestation it was known as the Conference of Commissioners on the Uniformity of Legislation in Canada.) The Conference is composed of representatives of the provincial governments and meets annually. It has managed to work for a long time without attracting any attention of any kind. That body has produced a number of draft uniform acts some of which have been enacted by the provinces. We have mentioned the Reciprocal Enforcement of Maintenance Orders Act as one example we shall examine in these materials. This legislation was needed if there was to be a chance of any kind of effective enforcement of maintenance orders interprovincially or internationally for the common law rules were completely inadequate. There is a closely analogous act, the Reciprocal Enforcement of Judgments Act which does not have as serious an impact on the common law. Apart from these two enactments (which all the common law provinces have adopted, though not always in identical drafts) there are other important uniform acts. One of the most important is the uniform Insurance Act. The uniformity of the provisions of the provincial acts is achieved by the annual meeting of the provincial Superintendents of Insurance. Uniform legislation is desirable to make the operation of the "pink slip" system of interprovincial automobile insurance work. That system operates across North America, though the uniform provisions only apply in Canada. The existence of a radically different regime in Québec creates, as we shall see, considerable difficulties, and from the insurers' point of view, offers certain plaintiffs opportunities for what the economists euphemistically call "strategic behaviour", i.e., the chance to profit - to obtain a consumer surplus - from litigation.

The development of uniform laws is one that may be expected to accelerate in the future, but the final form of the law may not be quite as is envisioned by the various draft conventions. Uniformity may be achieved by the fact that some laws are tending in the same direction (e.g., the introduction into Canada of legislation, like the Personal Property Security Act, R.S.O. 1980, c. 375; S.M. 1973, c. 5, Cap. P-35; S.S. 1979-80, c. P-6.1) based on Art. 9 of the Uniform Commercial Code of the United States and other legislation based on other parts of the U.C.C.,

e.g., Art. 8 and the Ontario Business Corporations Act, S.O. 1982, c. 4, and the Canada Business Corporations Act, S.C. 1974-75-76, c. 33) and by the coincidental development of similar rules for international contracts in a wide range of countries; the development being encouraged by the widespread use of international arbitration and the use of standard contract forms. Regardless of these developments (which are, in any case, mainly confined to commercial law; the problems of the international sale of goods, secured transactions or bills of exchange) the common law rules of the conflict of laws will remain important, and the examination of them and of the underlying problems that they create will fully occupy our time.

It is obvious that what we shall study in conflicts is closely related to many issues in International Law. As has been mentioned, an alternative term for conflicts is "Private International Law" as opposed to "Public International Law". No strict division between the two kinds of international law is possible, for at many points in the area covered by Conflicts there are international conventions and other evidence of the effect of international views on the propriety of certain actions by states. Several recent events have led to very public and very vivid examples of the kind of problems that are included in the area of conflicts. Among them can be found the Uranium Cartel and its aftermath, the Entebbe hi-jacking, the "Ocean Ranger" disaster, the Bhopal tragedy, some awkward problems for Canadian banks in dealing with bank secrecy laws and significant problems in the securities industry and the extent to which the supervisory role of the Ontario Securities Commission, or that of the Securities and Exchange Commission, can extend beyond the boundaries of the province or the United States: see, e.g., Fortune Magazine, 22 December, 1986, p.38. The advent of "free trade" between Canada and the United States is likely to increase the frequency of conflicts cases as the amount of trans-border trade increases.

As we shall see, there is the over-arching problem of the role of constitutional law and of nature of the federal system in the development of solutions to conflicts problems in Canada.

5. What is a "Conflicts" Problem?

There is a widespread belief, sometimes held by law students, that a client walks into a lawyer's office with a label on his or her forehead saying, "I have a torts case", or "I have a contracts case". The nature of any case is, of course, determined by the way in which the lawyer drafting the pleadings chooses to put his or her client's case. As a matter of practice, there are of course, obvious labels to attach to certain complaints made by a client. A client who states that she or he was injured in a motor vehicle accident will almost always present a torts case, and little thought is required by the lawyer when deciding how to draft the pleadings after hearing such a story. Other cases are not so clear. You are already familiar with the option that the lawyer may have to put a case of professional negligence or negligent misstatement on either contract or tort grounds. This option exists at the moment the client explains the problem to the lawyer, and may last until the time when the court gives judgment. The existence of the options open to a lawyer when he or she first has to decide what textbook or volume of the Canadian Abridgement to turn to is obvious. How long the option lasts is a function of the rules of pleading, and the existence of any rules that require a party to make a case on one of the available grounds.

What is important to remember is that the "labelling" process is not automatic: it is the exercise of a choice that the lawyer has in how the client's case is to be presented. This choice must be exercised creatively, for the lawyer who cannot see that a choice exists may not see the strongest argument for her client. The ability to make creative choices is the product of an informed imagination, and such an imagination is perhaps the most significant mark of the good lawyer.

We have said that a conflicts case is any case that presents geographically complex facts. How then does a conflicts case come before the courts? The conflicts issue arises from the pleadings in exactly the same way as any other issue. The lawyer drafting the pleadings on behalf of either the plaintiff or defendant will decide that his or her client's case will benefit from the allegation that there are geographically complex facts that are relevant to the court's decision. Just as the lawyer pleads that a contract was made which the defendant has breached, so the lawyer pleads that there are facts which indicate that the court should do something which it would not do if there were no such geographically complex facts. No conflicts issue arose in Tilden Rent-a-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.) because counsel for each party chose not to allege in the pleadings in the original County Court action

that the British Columbia facts were relevant. As we shall see, there may have been good reasons for that decision - reasons that would apply equally to each party.

The lawyer who chooses to allege that there are "foreign" facts may, of course, be unsuccessful in convincing the court that the foreign facts either exist or are relevant - the court may refuse to believe the witnesses who testify to the existence of a foreign fact, or the court may decide that the facts are as the pleadings allege, but that those facts have no bearing on the decision that the court believes is called for. In short, there is nothing about a conflicts case that is not present in any other case. It is only after the court has found that the foreign facts alleged in the pleadings exist and are or are not relevant to its decision that the problems we shall examine begin.

The following is an example of a typical statement of claim, statement of defence and reply. (Parts of each document have been omitted, particularly that part of the Statement of Claim that now constitutes the equivalent of the former Writ of Summons in Ontario.)

Introduction...

IN THE SUPREME COURT OF ONTARIO

B E T W E E N;

FALCONER MINES LTD.

Plaintiff

- and -

FLAVELLE MINERA ESPANA S.A.

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

.....

CLAIM

1. The Plaintiff is a limited company incorporated pursuant to the laws of the Province of Ontario with its head office in the Municipality of Metropolitan Toronto.
2. The Defendant is a limited company incorporated pursuant to the laws of Spain with its head office in the City of Madrid.
3. By a written agreement dated January 5, 1979 the Defendant agreed, inter alia, to pay to the Plaintiff as royalty an amount equal to 1% of the net income from the operation of its mine at Galicia, Spain once the said mines were brought into production. The Plaintiff relies upon the whole of the said agreement and will ask for leave at the trial of this action to refer to the whole of the said agreement for its true meaning and effect.
4. The mine at Galicia commenced production on or about the months of March or April, 1979.
5. The Defendant has failed to pay the Plaintiff its royalty and has indicated that it will not make the required payments.
6. The Plaintiff therefore claims:

(a) An accounting as to the amount of royalty owed to the Plaintiff by the Defendant;

(b) Judgment for the amount found owing by the said accounting;

(c) In the alternative damages for breach of contract;

(d) Interest, qua damages, at the bank borrowing rates during the relevant period;

(e) Costs of this action; and

(f) Such further and other relief as may seem just.

....

IN THE SUPREME COURT OF ONTARIO

B E T W E E N:

FALCONER MINES LTD.

Plaintiff

- and -

FLAVELLE MINERA ESPANA S.A.

Defendant

STATEMENT OF DEFENCE

1. The Defendant admits paragraphs 2 of the statement of claim but except as herein admitted denies each and every other allegation contained therein.

2. The Defendant says that by letter agreement dated January 5, 1979, it was agreed that under certain conditions, that if, as and when, the Defendant brought into production an operating mine at Galicia in Spain, the Defendant would pay to the Plaintiff as royalty, quarter yearly in arrears, an amount equal to 1 per cent of the net income as defined in the contract.

3. The Defendant pleads the proper law of the contract is the law of Spain by reason of the terms and nature of the contract.

4. The Defendant says that it is the law of Spain that the royalties are to be paid in Spanish currency and in accordance with the said law of Spain it is a requirement that the Plaintiff, as payee, must obtain the authorization of the Spanish Foreign Exchange authorities to open an account in domestic pesetas and then open such an account at a Spanish Bank. The Defendant pleads the resolution of the Spanish Foreign Exchange Institute dated July 19, 1971.

5. The Defendant denies that the Plaintiff has complied with the laws of Spain.

6. The Defendant submits that this action be dismissed with costs.

....

Introduction...

IN THE SUPREME COURT OF ONTARIO

B E T W E E N;

FALCONER MINES LTD.

Plaintiff

- and -

FLAVELLE MINERA ESPANA S.A.

Defendant

REPLY

1. The Plaintiff denies that the proper law of the contract is the law of Spain. The Plaintiff pleads that the proper law of the contract is the law of the Province of Ontario by reason of the terms and nature of the contract.

2. The Plaintiff joins issue with the Defendant upon its Statement of Defence.

....

Once the pleadings have been settled in the usual way, the case will now proceed as a conflicts case. The allegations about the existence of the foreign facts, i.e., that the mine was in Spain, and that content of Spanish law, which you will note has been specifically pleaded by the defendant, provides the defendant with an excuse for its non-payment of the royalty, will be established in the same way as any other fact: by the presentation of proofs by the parties.

The need to establish the provisions of Spanish law by evidence called to prove it as a fact suggests a fundamental difference between the methods used to establish the content of a foreign law and the law of the jurisdiction in which the court is situated. As you will remember from your course in Civil Procedure, you do not make allegations about the law in the pleadings. Once the facts alleged in the pleadings have been established, the court applies the law to those facts. No evidence can be called to establish the content of the domestic law of the court. Counsel may make submissions on the law, but these submissions are arguments, not evidence. In contrast to assertions of domestic law, the content of which does not have to be, and which cannot be proved by the introduction of evidence, the allegation that foreign law provides one party or the other with an argument for the result it wishes the court to reach, is one of those facts that have to be proved by expert evidence.

Just as some facts may have to be established by experts in a case of medical malpractice, so Spanish law will have to be established by an expert or by the court's consideration of the differing views of experts called by each party to support that party's allegations. A person called to testify as a "expert" must establish her qualifications to do so. A witness will most easily be recognized by the court as an expert entitled to give an opinion on the content of a foreign law by proof that she is entitled to practice law there. Sometimes judges, especially former judges, and occasionally law professors are allowed to testify to prove the contents of a foreign law. There may, of course, be a dispute over the "true" contents of the foreign law and there will be experts who contradict each other. It is the job of the trial judge to find the contents of the foreign law as a matter of fact, and she is no more justified in saying that she can, through her own ability to read the contents of a foreign statute, determine what that law is, than she would be to find any other fact in a case through her own investigations or knowledge. She must determine which of the experts is the more entitled to belief, by virtue of qualifications, reasonableness of the views expressed, or any other factor which goes to make up the mind of a trial judge in any case where the facts have to be found.

Introduction...

While the contents or provisions of the foreign law will be determined by the evidence of experts, the question whether the foreign law is relevant is a matter for the court hearing the case to decide in accordance with the law of the jurisdiction where the court is. The mere proof of the contents of foreign law no more establishes its relevance (i.e., its dispositive impact on the litigation) than does the mere proof that proper operating procedures were or were not followed in a particular surgical operation automatically disposes of an action for medical malpractice. The court may say that, in spite of proof of this fact, some other fact is of overwhelming relevance, and determinative of the litigation. We turn now to the methods of determining the validity of the plaintiff's argument that the foreign law is relevant. In other words, how does a Canadian court respond to the argument that a foreign law is determinative of the issue before the court?

PART A

I. CHOICE OF LAW

1. INTRODUCTION

In the general introduction to the materials it was stated that the problems of the Conflict of Laws could be summarized in three questions. Those questions were:

> 1. In what circumstances should the presence of geographically complex facts influence the decision of the court before which the plaintiff has brought its claim to take jurisdiction to determine the controversy?
>
> 2. What response does (or should) the court make to a claim presented by a party based on a judgment of another court in that party's favour? Does it (or should it) matter if that "foreign" judgment is that of another Canadian court or of a court of a foreign country? Does such a foreign judgment prevent further action in a province (or in Canada) arising out of the same facts? Does the judgment in favour of the plaintiff in the original proceedings give a cause of action to that party before a provincial court so that the foreign judgment can be "transformed" into a judgment of the local court on which a writ of seizure and sale may issue?
>
> 3. In what circumstances, if any, should the presence of geographically complex facts induce a court to consider determining the controversy by reference to some other law or rule of decision than that of the province in which the court before which the plaintiff has brought his, her or its claim is situated?

The first of these questions we can refer to as the issue of judicial jurisdiction. You will probably have come across the issue raised by the presence of foreign facts in this context in your course in civil procedure when you examined the notion of "forum conveniens" and service <u>ex juris</u>.

The second question is referred to as the issue of the recognition and enforcement of foreign judgments. Recognition in this context refers to the giving of effect to a declaration of a

foreign court that some legal controversy has been resolved in favour of one of the parties litigating before that foreign court. The most common situation where the recognition of the judgment of a foreign court is in issue is whether it has validly dissolved a marriage by a decree of divorce, so that the parties are, for example, free to remarry in a Canadian province. This question may be relevant because one of the former spouses has remarried in reliance on the foreign decree, and the validity of that marriage is now in issue. Enforcement is the transformation of a foreign judgment into a claim that is recognized as valid in the province and on which, after judgment or some more speedy procedure, execution can be levied against the defendant's property. 'Foreign' in the context of these rules means, as we have mentioned, any jurisdiction that is separate from that of the recognizing or enforcing court. Under the rules in this area of the law one province is as foreign to another province as is some truly foreign country such as France or Afghanistan. We express the same idea by saying that, for the purposes of the conflict of laws, and in respect of those matters that are governed by provincial law in any of its manifestations, Ontario and Saskatchewan are separate jurisdictions.

In respect of those matters that are governed by federal law (under the Constitution Act, 1867, s. 91), Canada would be a single jurisdiction, and the separateness of the provinces (again under the Constitution Act) would be irrelevant. This consequence does not always follow. In creating the rules for determining where petitions for divorce could be heard under the 1968 Divorce Act, the federal parliament chose to make the separateness of the provinces relevant. Under the Divorce Act the requirements that justify the courts of a province taking jurisdiction to decide the dispute are set out. The need to use the provincial courts to hear petitions for divorce arose because there was no federal court with jurisdiction to hear such petitions[1].

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[1] When the Divorce Act was first passed in 1968, the courts of Québec and Newfoundland did not have jurisdiction under provincial law to hear petitions for divorce. People in those provinces who wanted to get divorced had had to seek a private act of the federal parliament dissolving their marriage. The new act, for the first time, made judicial divorce available in all the provinces. To deal with the problem created by the situation in Québec and Newfoundland, the act provided that the Federal Court of Canada would hear petitions from those provinces. Before the act came into force, both provinces had amended their legislation to permit their courts to hear petitions for divorce.

The third of these questions is known as the choice of law question. In practice it is the most important and the most difficult to determine. The rules that are accepted as governing the other two questions are well established (though that fact should not lead you to fall into the trap of thinking that they do not present grave problems for the courts or for lawyers who must plan around them). In contrast, the rules governing the choice of law issue are much more open to argument and are much more difficult both to determine and apply. The questions raised by the choice of law issue are some of the most intractable problems that you are ever likely to run into in the law. We start our examination of conflicts by examining the choice of law process.

The Choice of Law Process

The issue raised by the choice of law question may be stated in the following way:

> If a Canadian court does exercise judicial jurisdiction to hear a case in which there are allegations in the pleadings that a foreign law has an impact on the decision that the court should reach, what rule of decision does it apply? Does it apply its own law, i.e., the law of the province where it is, (or in a matter to which federal law applies, Canadian law) or the law of some other place, and if it does decide to apply the law of some other place, how is that place to be determined?

It is obvious that the geographically complex facts may not be limited so as to implicate in the decision the law of only two jurisdictions: the case could have connections with two or more jurisdictions. A marriage or succession case, for example, may make relevant the parties' entire lives and many jurisdictions may arguably be relevant to the question the court has to decide.

As you could see from the pleadings set out earlier, the issue in that case was one of choice of law. The defendant stated that the contract had to comply with Spanish exchange control regulations, and of course, the plaintiff denied it. What is the basis for the defendant's argument that the law of Spain is relevant to a dispute brought before the Ontario High Court?

A simple (<u>not</u> a simplistic) view of the law might assume that an Ontario court, or any other court, by applying its own domestic rule of decision to the issue of the liability of one contracting party to the other, would be as able to be just, fair, or competent to meet any other required standard as any other court applying its domestic rule of decision. Why then

should the Ontario court abandon its domestic rule of decision and adopt that of Spain?

Notice that we have to be very careful of the terminology that we use. We refer to a "domestic rule of decision" to indicate the rule that would be applied by the court if there were no relevant foreign facts of any kind - as if the whole matter had arisen with an exclusively local focus. If we were to refer to "Ontario law" or to "Saskatchewan law" in those terms we create a risk of being ambiguous, for those phrases, given what was said on p. 24 (supra) about the question of the relevance of foreign law being determined by the law of the province where the court is situated, may be taken as referring to the local provincial law including its choice of law rule. The existence of such ambiguity begs the question we have to decide. If a reference to provincial law were to include the choice of law rules of the province, then of course, all cases coming before the courts of that province would be dealt with by provincial law and a conflicts case is decided by provincial law in exactly the same way as a case in which there were no relevant foreign facts would be: we have simply stated what is a tautology. The phrase "domestic rule of decision", though cumbersome, is at least accurate and faithful to the distinction we are trying to draw.

We shall see that one of the most awkward problems we face is the need to be completely accurate in how we refer to the law applied in a wholly domestic case, and to the law that might incorporate resort to some foreign law because our choice of law rules have made that law relevant.

The argument that a court would be justified in applying its own domestic rule of decision in all disputes that come before it is a powerful argument. It is hard to deny that any court will reach a "just" result by applying its own domestic rule of decision. Consider for a moment the consequences of the denial of the truth of that statement. Its denial forces one to argue that the decision of an Ontario court applying Ontario law is not a just decision. If this argument is sustained in some sense, what happens now in a case in which there are no foreign facts? Is the decision of the court now "just" in some way that was not true in the earlier conflicts case? We have therefore to be very careful about the language we use and the implications of our usage on such fundamental issues as the nature of a "just" decision.

We have to put the issue raised in a conflicts case so that we do not have to deny that the application of the local or domestic rule of decision is just: we have to argue that in the special context of the case in which there are geographically

complex facts, a more just decision will be, or may be reached by the choice of the domestic rule of decision of another jurisdiction. We can never forget the power of the argument that decisions of Nova Scotia courts applying Nova Scotia law are going to be as just, or will conduce to the achievement of a just result as will decisions of Nova Scotia courts choosing in place of their own domestic rule of decision one of another province or country.

When we are in a position to review all, or a large part of the choice of law rules in conflicts, we shall see that the need to justify the decision to apply some other rule of decision than a court's own domestic one is the heart of the choice of law process. Since it is true as a matter of fact that a court's domestic rule of decision will not be applied in all cases that come before it, and that cases that present geographically complex facts will often be decided by reference to some other rule of decision, it becomes necessary to determine when a court will abandon its rule of decision and rely instead on that of another jurisdiction.

The Structure of Conflicts Analysis

The most important thing to understand at this stage of the development of your understanding of these materials is the generally accepted structure of the argument that is implicit in the statement that in certain circumstances one provincial court will abandon its domestic rule of decision and adopt that of another. **It is not possible to understand anything about most of the cases in these materials if you are not clear on how an argument regarding the choice of law issue must be structured.**

When counsel have, in the pleadings,

(a) made allegations about the existence of foreign facts, and

(b) about the content of foreign law, and

(c) the court has found as a fact that there are geographically complex facts in the case and

(d) that proof of the content or terms of the foreign law has been properly made, so that the court could, if necessary, make a finding of the content of that law,

the court must proceed to determine whether that foreign law should be applied by it to reach its decision in the case.

This last determination may be stated as raising the question, first stated on page 24 (supra) whether the foreign law is relevant to the issues before the court.

This structure of analysis or reasoning adopted by the common law to determine the relevance of the allegations of the content or terms of the foreign law, or to provide the justification for referring to it to provide a rule of decision in the case is the following:

1. The first question that the court must ask itself is whether the case before the court is a "contracts" case (as opposed to a torts case, a property case, a bankruptcy case or some other comparable legal categorization). The answer to this question is the result of the process of "characterization". It is the process, in essence, of deciding in what textbook or volume of the Canadian Abridgement one would turn to for guidance on the law applicable to the facts as they are described by a client, or of deciding whether to look in the card catalogue in the library under "contracts", rather than some other heading. As we shall see, characterization is crucially important in conflicts analysis.

[Sometimes the terms "classification" or "categorization" are used instead of "characterization". There is something to be said for using terms that are less obscure than other ones, but the last term is the most common in the literature. Since there is little profit to be gained in our fighting minor linguistic conventions, we shall use "characterization" in these materials to refer to the process of determining the legal category into which the plaintiff's cause of action will be put.]

2. Once the case is characterized as a contracts case, the common law provides that there is a special "choice of law rule" applicable to contracts cases.

3. The modern formulation of the contracts choice of law rule is that a contract is said to be governed by its "proper law". [The word "proper" here means that the contract belongs or relates to that law distinctively (more than to any other) or exclusively (not to any other): Oxford English Dictionary "proper" I.2]

4. If we take for illustration the facts alleged in the pleadings set out above, the defendant maintains that the proper law of the contract is Spanish. The argument that the "proper law" is that of Spain cannot

> be established by evidence, for we are now in the area where the determination of the question before the court is a matter for the local law: it is a question of law, not of the facts. As we have stated, the parties will have led (or challenged) evidence of the existence of foreign facts and of the content of the Spanish law. From what the pleadings disclose, the dispute over the question of the rule of decision to be applied is the court's choice of Spanish law or Ontario law as providing the rule of decision. Notice that it is assumed by the plaintiff that if Ontario law applies, it can succeed on its claim.

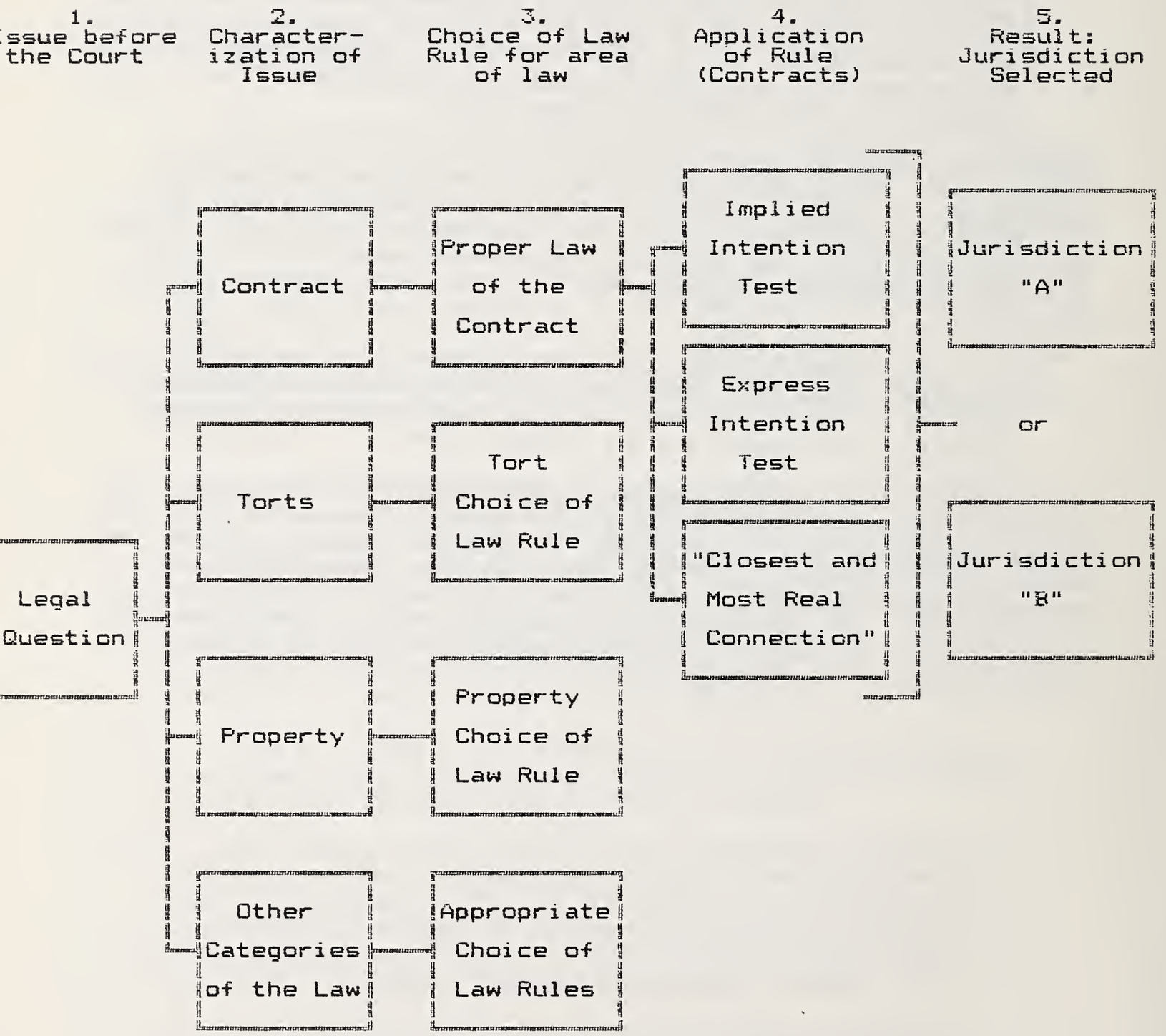
While this dispute centers on the application of Spanish or Ontario law, the dispute could just as easily be whether the provisions of Spanish law or of the law of Québec should apply. In this latter situation, the plaintiff would have had to allege the content of the law of Québec, and would have had to lead evidence of that law by producing for the court experts on that law.

> To summarize the issue we can say that the focus of the dispute, under the law of the province where the action is brought, is to determine which of the possibly competing laws will be chosen as the "proper law".

(The various tests for the determination of the proper law are set out in the first case reproduced in the next section of these materials. For the moment it will be simplest if you can accept the statement that the choice of the "proper law" or, speaking more accurately, the identification of it will decide the dispute. The positions taken by each side in the pleadings make it obvious that they have assumed that this determination will dispose of the litigation.)

We can represent the structure we have just outlined in the following way:

Table 1



The structure that you can see in Table 1 illustrates the crucial importance of characterization, and the resulting automatic selection of a "choice of law rule" to govern each of the various legal categories into which a legal issue can be put.

You will have noticed that there are three formulations of the "proper law test" in column 4. At this stage it is not important that you know precisely what each formulation entails. We shall examine each of them in the next section of the materials. It is only important that you realize that there may be uncertainty about the exact form of the choice of law rule.

This uncertainty exists in the choice of law rules of all other categories of the law, torts, property, etc. We have avoided indicating the form of the uncertainty by simply referring to the "appropriate" rule for each of the categories of the law. We can postpone our examination of the nature of the uncertainty and of its origin until we come to examine each of the areas mentioned.

Any uncertainty over the exact or "correct" formulation of a choice of law rule, i.e., the rules stated in the third column of Table 1, <u>does not bear on the validity or general acceptance of the structure outlined in the table</u>. That structure is almost universally accepted by the courts and by most academic commentators as the basis for any analysis of conflicts problems. It is essential that you understand it.

The result of the process of analysis outlined in Table 1 when applied to the facts stated in the pleadings that we set out earlier is that the court will decide whether the law of Spain or the law of Ontario is the "proper law of the contract". We can assume that it might make a difference to the decision if the court adopts one of the tests in the fourth column rather than another, and counsel will argue that the court should adopt that formulation that she or he thinks will most likely result in a decision favourable to her or his client.

When we come to examine each of the tests for the determination of the "proper law" we shall see that each refers to or incorporates certain facts. For example, the "Implied Intention Test" refers to the possibility that an inference can be drawn from the foreign and Ontario facts proved by each party's witnesses that the parties would have chosen to have their contract governed by one law rather than another. The kind of facts that might induce the court to draw the inference are facts that suggest a "connection" between the contract and one of the jurisdictions claimed to be the proper law. Such facts would be the location of the mine from which the royalties will be earned in Spain, the place where the contract was negotiated, where the contract was executed by the parties. We refer to these facts as

"connecting factors". They help to "localize" the contract, or in other words, they are relevant under the choice of law rule chosen by the court as the appropriate one determine the proper law.

Once the court has determined which of the available formulations of the proper law it will use, it will consider the various "connecting factors" that will be offered by counsel as evidence that the domestic rule of decision of one or other of the jurisdictions should be applied to the facts. Generally speaking, the choice of the law, i.e., the domestic rule of decision, of either jurisdiction "A" or "B", will result in the application of that jurisdiction's rule to dispose of all aspects of the dispute. We can speak then of result of the choice of law process as identifying a "governing law" for the dispute. The "governing law" may be either that of the forum, i.e., the law of the place where the action is heard, or of the foreign country. (In some cases, of course, both counsel may agree that the law of the forum is not the proper law, but disagree over which of two foreign laws should apply.) If the foreign law is chosen as the proper law, it will displace the domestic rule of the forum in favour of that of the foreign country.

In this way the domestic rule of decision of the court where the action is begun, in our example Ontario, will be displaced by some foreign rule of decision. This result justifies the importance we attached in the earlier discussion of the need to be very careful in how we state the operation of conflicts rules. Since the Ontario court may have to choose the law of Spain to decide the dispute brought before it, the court cannot make that choice unless at some level of analysis it is prepared to assume that the result of the application of Spanish law will result in a decision that is as just and as fair to the parties as would a decision to apply the domestic law of Ontario.

We say, "at some level of analysis" because we need to be free to examine very carefully the claim that a court can be indifferent to the result of an inquiry that may lead to a dispute's being resolved by the application of a rule that the forum, either through the common law process of law-making or through the local legislative process has rejected as appropriate for cases without any geographically complex facts. We use the word "rejected" in the preceding sentence even though we know that the decision to adopt one rule rather than another is often more a case of acquiescence in the historical evolution of the law than a conscious choice between competing values. How far evolution can proceed without the implication of some set of values is, of course, one of the principal problems of the law, and you will have struggled with the consequences of such

"unconscious law-making" in all of your other courses in the law school. It is one of the features of conflicts cases that they bring out issues that often lie deeply buried in ordinary, non-conflicts cases.

The structure of the choice of law process is, as Table 1 makes clear, generally applicable whatever the problem before the court might be. If the problem is, at the initial stage of the process outlined in the table, characterized as a torts problem rather than a contracts problem the choice of law rule that would be found in columns 3 and 4 of Table 1 would be different. You can understand why in a conflicts case it would be very important to the outcome if a case were regarded as torts case rather than a contracts one. The process of characterization is extremely important to the outcome of a case, and may sometimes be determinative of it.

For example in Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 143 (1928, Sup. Ct. Conn.) the defendant had rented a car to a driver in Connecticut. The driver injured the plaintiff, a passenger in the car, while driving in Massachusetts. If the case were regarded as a torts case, the choice of law rule then applied by the American courts would have led to the application of the law of Massachusetts and the plaintiff would have lost his case. Under Massachusetts law the owner of the car who rented it out was not liable for the negligence of the driver. Under the law of Connecticut the owner would be liable under the circumstances of this case. The law of Connecticut could only be applied if the case could be regarded as a contracts case, so that the liability of the owner could be said to depend on the law governing the contract between it and the driver.

Everything therefore turned on whether the case was characterized as a torts case or a contracts case. The entire argument before the appeal court dealt with whether the trial judge had correctly characterized the cause of action as a contracts case thereby making the defendant liable.

In one sense, learning conflicts is learning what is the appropriate choice of law rule applicable once some particular characterization of the issue under examination has been made either by a court or by yourself in giving advice to a client who is contemplating litigation, or in planning your clients affairs with an eye to the risk of future litigation.

The goal of the choice of law process is usually stated as being the achievement of predictability and uniformity. It is believed that precisely defined choice of law rules will result in predictable results, so that the outcome of any case can be foreseen with some degree of confidence, and plans made on that basis. It is similarly believed that choice of law rules will

result in uniformity in that the result in any case will not depend on the place where the action is brought. The validity of and the methods of achieving both of these goals will be considered in the materials that follow.

In considering the issues raised in the preceding paragraph, you might like to keep in mind the story of the hedgehog and the tortoise as told by Rudyard Kipling in the Just So Stories in "The Beginning of the Armadillos". You will remember that the Painted Jaguar was confused when he met the hedgehog and the tortoise and was unable to tell which was which. As a result of his confusion, both escaped becoming the main course for his dinner. To make good their escape they both became something different from what they had been. When he told his mother of his meeting with two strange new animals he said,

> "Mother, there are two new animals in the woods today,and the one that you said couldn't swim, swims, and the one that you said couldn't curl, curls; and they've gone shares in their prickles, I think, because both of them are scaly all over, instead of one being smooth and the other very prickly; and besides that, they are rolling round and round in circles and I don't feel comfy."
>
> "Son, son!" said Mother Jaguar ever so many times, graciously waving her tail, "a Hedgehog is a Hedgehog, and can't be anything but a Hedgehog; and a Tortoise is a Tortoise, and can never be anything else."
>
> "But it isn't a Hedgehog, and it isn't a Tortoise. It's a little bit of both, and I don't know its proper name."
>
> "Nonsense!" said Mother Jaguar, "Everything has its proper name. I should call it 'Armadillo' till I found out the real one. And I should leave it alone."

The first part of this course is perhaps best described as being largely about Hedgehogs, Tortoises and Armadillos.

A Note on the Historical Development of the Choice of Law Process

There is a very long history to the choice of law process. A variety of it can be found in Roman law where the praetor peregrinus decided disputes, brought before him in Rome, between foreigners on the basis of their own law (as opposed to Roman law). There was a significant flowering of conflicts analysis in the Italian city states between the fourteenth and early sixteenth centuries. Some of the ideas developed at that time continue to have an effect on what we do now, and that effect appears in some odd places. We shall examine some of these examples later in the materials.

For our purposes, the modern development of the process we have outlined in this section of the materials can be traced to the nineteenth century. The ideas developed then are very much still with us. It is one of the most curious features of conflicts analysis that in many respects it is a true anachronism, rather like some very ancient species of animal that has survived to our time with an extraordinarily primitive reproductive or digestive system - some fundamental feature of its anatomy that appears quite anomalous when compared with more highly developed species.

The conflict of laws first emerged as a separate body of law in the works of Joseph Story (1779-1845), who in 1834 published his treatise on the Conflict of Laws. At that time Story was a member both of the United States Supreme Court and of the Law Faculty of Harvard University - "moonlighting" was then regarded as the mark of a competent person, and not as a cause for decanal concern! Story borrowed extensively from European sources, and one of his more significant borrowings was from European and English writing on Natural Law theory. That source permitted Story to state his rules and his structure of analysis with more firmness and infallibility than is or was usual in law, except perhaps for Lord Mansfield, whom later generations loved to prove wrong!

The rules as they were later developed in England were heavily influenced by Story's writing. English texts began to appear in the latter part of the century: Dicey, A Digest of the Law of England with Reference to the Conflict of Laws, 1896 (now known as Dicey & Morris, 11th Ed. 1987), Westlake, A Treatise on Private International Law, 1858 (latest edition, 1925). Since then, the volume of writing by academic commentators has been prodigious. Some of their contributions will be referred to in these materials.

Notice that the first texts were written in England at about the same time as the first texts on Contracts, Torts, Jurisprudence (for law students) and Constitutional Law (in the English

sense) were appearing. The philosophical basis for all of this writing was the prevailing view that law was (not should be) a set of logically consistent propositions; that lawyers should strive to be "scientific", and that law was a "science". The intellectual justification for these claims was the perceived power of science and the "scientific method" and the consequent desire of those writing about law to hitch their wagons to its rising star, and to claim to be in the forefront of intellectual inquiry.

We now associate this view of the basis for law with "Formalism", and we contrast it with the views of, e.g., the "Realists": writers like Llewellyn, Morris Cohen and Jerome Frank. It is one of the major sources of the problems we shall face that the texts on Conflicts seem to be caught in some kind of time-warp where, though the rest of the law (as evidenced by the decisions of the courts and academic writing) has generally rejected formalism, in Conflicts alone formalism remains the dominant theory. As a result, the Canadian judicial and academic approach to conflicts is truly an anachronism.

Notes

1. As was mentioned earlier, the determination of the content of any foreign law is a question of fact. It is proved by expert witnesses. As the judgment of Porter, C.J.O., indicates, only a person who is entitled to practise law in the jurisdiction is entitled to give evidence as an expert. (Academics and judges from the foreign jurisdiction are occasionally, as a mark of especial favour and esteem, allowed to appear as experts in some foreign law.) The origin of this rule is, once again, distant. It arises out of a legal system that existed in a state which differed from Canada and with an attitude to law which we no longer hold. As we have said, the origin of our conflicts rules was English law. England is regarded as unitary state - to the occasional rage of the Scots - even though the separateness of the Scottish legal system gave the law of the United Kingdom some of the aspects of a federal state. English law, i.e., the common law, has exhibited over the centuries more than a little xenophobia. The common law has often been proud of its independence of the contagion of the Roman law. This independence is frequently obvious in judgments on issues of procedure, and matters of evidence are often the essence of procedure.

As an illustration that such xenophobia still exists there is the recent case, Amin Rasheed Shipping Corporation v. Kuwait Insurance Co., [1984] 1 A.C. 50, [1983] 2 All E.R. 884, (H.L.). The issue before the court was whether the English court should take jurisdiction to hear a case involving a dispute between a Liberian company, operating out of Dubai, whose ship had been seized by Saudi Arabian authorities, and the insurer who operated in Kuwait. Lord Diplock considered the argument that the English procedure was superior to that of the civil law and that such superiority justified the English courts in taking jurisdiction to hear the dispute. In rejecting this argument, he said: (p. 67 (A.C.), p. 892 (All E.R.)

> My Lords, it was urged upon this House, as it had been urged upon the courts below, that since Kuwait is one of those countries whose courts adopt the practice and procedure that is followed in countries whose legal systems are derived from the civil law and not from the English common law, the ability of a Kuwaiti court to decide matters of disputed fact is markedly inferior to that of the Commercial Court in England. None of the judges in the courts below accepted this invitation to embark on the invidious task of making a comparison of the relative efficiency of the civil law and common law procedures for the determination of disputed facts. In my opinion, it would have been wholly

> wrong for an English court, with quite inadequate experience of how it works in practice in a particular country, to condemn as inferior to that of our own country a system of procedure for the trial of issues of fact that has long been adopted by a large number of both developed and developing countries in the modern world. So a natural prejudice in favour of a procedure with which English lawyers are familiar is not a consideration to which any weight ought to be given in determining whether a Kuwaiti court or the Commercial Court in England is the forum conveniens for the present litigation.

[Note: the phrase "forum conveniens" is one of the tests which we shall explore later in Part 2 of these materials when we consider the rules governing the taking of jurisdiction in an action with foreign facts. The test is based on the notion that one court may be a more convenient forum than another, and that such a fact may be relevant in deciding whether the forum is justified in taking jurisdiction, or whether another court would be a more convenient forum.]

This xenophobic or chauvinistic aspect of conflicts, derived directly from the English tradition, illustrates one of the pervasive problems of conflicts in a federal state like Canada. Neither xenophobia nor chauvinism are justifiable attitudes to take to the law or procedures of another province.

To return to the issue of the proof of foreign law, it is odd, to say the least, that an Ontario judge can look at a case from Nova Scotia or British Columbia (as is done every day) to find out what Ontario law might be, but not for the purposes of finding out what Nova Scotia or British Columbia law might be. A trial judge who says that she can read Nova Scotia cases and statutes as well as or better than the expert called to testify on Nova Scotia law may get her knuckles rapped by the Court of Appeal. (See, e.g., Lear v. Lear (1974), 5 O.R. (2d) 572; 51 D.L.R. (3d) 56 (C.A.)). The absurdity of requiring expert evidence of Ontario law in a Nova Scotia court, and vice versa has been recognized by amendments to the Evidence Acts of several provinces. These amendments permit the judge to take judicial notice of the law of another jurisdiction in certain circumstances. Thus, the Nova Scotia Evidence Act (R.S.N.S., 1967, c. 94, as am.) provides in s. 2(3):

> S. 2(3) Notwithstanding any other provision in this Act, judicial notice shall be taken of all Acts of the Parliament of Canada, of this Province, or of any province, or territory forming part of Canada, or of any ordinance of any such territory, whether enacted before or after the passing of the British North America Act, 1867.

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The Manitoba Evidence Act, R.S.M., c. E-150, s. 31 and the British Columbia Evidence Act, R.S.B.C., 1979, c. 116, s. 26 are even broader.

Manitoba:

> 31. Judicial notice shall be taken of
>
> (a) all Acts of the Imperial Parliament and all rules, regulations, forms, and schedules, made under the authority of any such Act;
>
> (b) all Royal proclamations and Privy Council orders;
>
> (c) all Acts of the Parliament of Canada and all rules, regulations, forms, and schedules, made under the authority of any such Act;
>
> (d) all ordinances and Privy Council orders made by the Governor in Council of Canada;
>
> (e) all proclamations of the Governor General of Canada;
>
> (f) all Acts and ordinances of the legislature of, or other legislative body or authority competent to make laws for, any province, colony, or territory which, or some portion of which, on, before, or after, the coming into force of the Revised Statutes, formed or forms part of Canada, and all rules, regulations, forms, and schedules, made under the authority of any such Act or ordinance
>
> (g) all ordinances and orders in council made by the Governor in Council, Lieutenant Governor in Council, or Commissioner in Council, of any province, colony, or territory which, or some portion of which, on, before, or after, the coming into force of the Revised Statutes, formed or forms part of Canada and all proclamations of any such Governor, Lieutenant Governor or Commissioner;
>
> (h) all Acts and ordinances of the legislature of,or other legislative body or authority competent to make laws for, any other part of the British Commonwealth.

British Columbia:

> 25. In section 26 "Imperial Parliament" means the Parliament of the United Kingdom of Great Britain and Northern Ireland, or any former kingdom which included England,

whether known as the United Kingdom of Great Britain and Ireland or otherwise.

26(1) Judicial notice shall be taken of all

(a) Acts of the Imperial Parliament;

(b) Acts of the Parliament of Canada;

(c) ordinances made by the Governor in Council of Canada;

(d) ordinances made by the Governor in Council, Lieutenant Governor in Council or Commissioner in Council of any province, colony or territory which, or some portion of which, forms part of Canada, and all Acts and ordinances of the Legislature of, or other legislative body or authority competent to make laws for, the province, colony or territory;

(e) Acts and ordinances of the Legislature of, or other legislative body or authority competent to make laws for, any dominion, empire, commonwealth, state, province, colony, territory, possession or protectorate of Her Majesty;

(f) regulations published in the Gazette.

(2) This section applies to all dominions, empires, commonwealths, states, provinces, colonies, territories, possessions and protectorates at any time heretofore constituted, as well as those now existing, and also applies to ordinances and Acts made or enacted before as well as to those made or enacted after the enactment of this section.

Ontario, Alberta and Newfoundland have no such provisions. Even in provinces which have provisions in their evidence acts requiring courts to take judicial notice of the statutory law of other provinces the courts have not construed those provisions widely. It is still incumbent on one of the parties to raise the issue of the possible applicability of foreign law. Courts do not take judicial notice of the statutes of other provinces in the way that they can take judicial notice of their own province's statutes (i.e., by considering those statutes even though the parties may not have pleaded them). See Archie Colpitts Ltd. v. Grimmer (1978), 27 N.S.R. (2d) 341 (N.S.S.C., A.D.).

2. The choice that the court faced in Etler v. Kertesz was whether the law of Switzerland or Austria governed the problem facing the court. As we saw, the answer to this question was determined by asking which jurisdiction had "the closest and most

real connection" to the transaction. This question was answered by considering the geographical facts surrounding or arising in the transaction. The rule that one drives from Etler v. Kertesz is that the determination of the "proper law" in a contracts case is to be made by considering the jurisdiction with which the contract has its closest and most real connection.

3. Because the choice of law rules for torts or any other area are different, it becomes extremely important to know whether we are dealing with a contracts case or some other kind of case. Porter, C.J.O., does not have to worry much about the problem of "characterizing" the case as a contracts case: he more or less assumes that the contracts approach is the right one. As was emphasized in the Introduction to the choice of law process, this process of characterizing or classifying the problem is, of course, an integral part of any thinking about law. A lawyer has to know, for example, whether he looks in the Digest under "Contracts" or under "Criminal Law" for the answer to his problem. When the process becomes, not a way of organizing one's thoughts so that one can begin to think about the problem one faces, but a crucially important stage in the legal analysis, odd things begin to happen. We are all familiar with the difficulties caused by the need to project distinctions onto facts that do not support them. Is this an offer or something else? Is this a condition precedent or something else? Is this person an invitee or licensee? Is this a sale of goods or something else? Is this thing a fixture or something else? There are, of course, paradigm cases, but the hard cases do not submit easily to analysis.

4. The process of characterization is central to the inquiry into choice of law questions. Its importance is increased because, in general, the choice of the governing law results in its application to every issue that can arise. Such an approach is called a "jurisdiction-selecting" approach. We choose between the whole of Swiss or Austrian law, not between a single rule to deal with the particular dispute derived from Swiss or Austrian law. If we adopted this latter approach in respect of the issues arising in Etler v. Kertesz, we would consider the particular provisions of those laws as they had an impact only on the question of the enforceability of a contract tainted with illegality arising from a breach of exchange control regulations in one of the two countries involved.

5. Once the question of characterization has been determined, the remaining questions in the traditional choice of law process are also answered in the abstract. That is, the choice between Swiss law or Austrian law is made before the court (formally)

considers the application of the particular rule in the facts of the case. The court is aware, of course, that, as the pleadings set out above disclose, each party is arguing that the law of one jurisdiction applies rather than another, and that the parties expect, at least, that the choice will determine the case in favour of one side or the other. As Professor Castel writes: (Canadian Conflict of Laws, Vol II, p.14)

> The relevant conflicts rule of the forum enables the court to select a particular country or jurisdiction applicable to that legal category or issue without first having to ascertain how that law would decide the case. The jurisdiction-selecting choice of law rule makes a state or country the object of choice. It does not consider the contents of the applicable law.

6. In Etler v. Kertesz there was no express choice of the governing law. When the notion that contracts, or speaking more precisely, the binding force of contracts, derived from an exercise of human will became fashionable in the middle of the nineteenth century, it was thought necessary to justify doing anything that the parties had not expressly agreed to by finding an "implied term". Such a term would be to the effect that the parties would have agreed to what the court wanted to do if they had thought about it. One of the best examples of such reasoning can be found in the judgments of the court in Taylor v. Caldwell (1863), 3 B.& S. 826, 122 E.R. 309, (the "Music Hall" case) where the court justified its decision to regard the contract as frustrated on the ground that it could find an implied term in the contract. It was held that such a term provided for the mutual discharge of the parties in the events that had happened. This method of reasoning was consistent with the underlying theory of contracts at that time. No account was taken of the logical and economic (or simple fairness) problems of imposing on the parties a decision, ostensibly based on the terms of their agreement, that ex hypothesi they had not thought about. No account was taken, nor could be taken of the kind of bargain that might have resulted had the parties, or their legal advisers had the forethought to consider how the loss arising from the destruction of the music hall would be allocated.

As the will theory declined in popularity and was replaced (at least as regards the law of frustration) by a more forthright allocation of the risk of loss as the court thought fair in the circumstances, so too in conflicts it was seen as less necessary to justify the decision to "find" a choice of law term in the contract. The Court of Appeal in Etler v. Kertesz had accepted the more objective theory of contracts, and while referring to the implicit choice cases, preferred a more objective formulation of the proper law. It is, of course, as unclear in conflicts cases as in contracts cases generally, whether it makes any

difference to the actual result what theory the court adopts. The advantage of a more objective theory may lie in its more open acceptance of the court's role in the allocation of the risk of loss. Such openness is likely to lead to a greater degree of predictability.

The next case is chosen as a paradigm example of the use of the implicit choice test. It is older than Etler v. Kertesz by a few years and this fact (together with the very strong influence of English contracts texts like Cheshire and Fifoot) may explain the court's preference for its formulation of the connecting factor as one based on inferences supposedly drawn from the agreement. The case also illustrates in a particularly vivid way the abstract nature of the choice of law process as outlined by Castel.

Questions and Notes

1. What are the facts of the case? What is the contract dispute about?

2. Note that the search for the proper law in The Assunzione was made in the abstract; that is, the contracts issue being contested was wholly left out of the reasoning process. The court counted the contacts mechanically, without elaborating any theory as to why such contacts should bear on the resolution of the case. The mention by Singleton, L.J., of the importance of "business efficacy" suggests that judicial decisions should be justifiable by reference to extra-legal criteria. However, such reference in this case is left markedly vague. We are told to "look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract." As the notes after Etler v. Kertesz indicated, this statement raises the thorny problem of the role of implied (or, more precisely, inferred or "constructive") intention in contracts law.

3. If the parties to a contract have actually intended something, the issue before the court will be (barring pre-emptive concerns such as illegality and unconscionability) one of the interpretation of the contract. The process of interpretation does not have to be narrow and mechanical. Properly done it should seek to forward the parties' expectations as those may be found in the actual words used in the contract and in generally accepted business practices or understandings on such issues as the allocation of the risk of loss in particular circumstances. The process may often be very difficult as the words may be unclear and the background expectations unhelpful. Serious problems may arise if the parties have different expectations. The issue that then has to be faced is whether one party's expectations should be preferred over, or protected against the expectations of the other. Such a process must still serve the overall purposes of the law of contracts, and must for example, encourage reliance on contracts and promote the role of contracts in an exchange economy: see, e.g., Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A. (The "Maratha Envoy"), [1978] A.C. 1, [1977] 2 All E.R. 849, (H.L.) where the role of the courts in interpreting commercial contracts was usefully stated.

4. If the parties can be said "not to have intended" something in the sense that they have made no provision for its occurrence, and there are no background facts to supplement the agreement, the court's role is now one of the need to allocate a loss that was not foreseen and the risk of which was not allocated by the

terms of the agreement or by its context. It is at this point that the courts advanced (more so in the nineteenth century and in the first half of this one than now) the notion that the allocation can be achieved by "finding" an implied term. Is the reasoning process advanced by stating that "just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy?" Or is such a statement a means of masking the problem, such that it is ultimately resolved without any reasoning at all?

5. The preceding point becomes clearer if you consider the following questions:

(a) If you were counsel to one or other of the parties in The Assunzione how, assuming that you had expected the issue to be raised, would you deal with the evidence necessary to support an argument based on the criterion of what would "accord with business efficacy"?

(b) How would your answer to part (a) differ if you had to address the question in the light of the facts that the Court of Appeal had before it as it made its decision.

(c) Does the process of reasoning adopted by the Court respect the characteristics of the judicial process: the right of the parties to participate through the presentation of proofs and reasoned arguments?

6. Are we being unfair, and if so how, if we suggest that you note that in the search for the jurisdiction with the closest and most real connection with the contract there is no closed list of connecting factors. We saw Singleton, L.J. noting that the ship had an Italian flag, an Italian owner, an Italian master and so on. He could easily have gone on to note that it had an Italian cook and a galley full of spaghetti, and that these facts also pointed to the contract's being governed by Italian law. The French facts, "connecting" the contract to France could also be multiplied by an imaginative lawyer. Judges who wish to manipulate the proper law of the contract test by multiplying connecting factors on one side of the equation find it very easy to do so. This means that the choice of law process in contracts can turn into a contest to see which party's lawyer can think up the most connecting features. When we speak of the choice of law rule as being the identification of that jurisdiction with the "closest and most real connection", we are asking a question which invites the same factual inquiry as that resulting from the question asked by the Court of Appeal. In other words, the judgment in The Assunzione adopts a rule that has the same content as the rule applied in Etler v. Kertesz.

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7. One of the major justifications for the approach to the choice of law process exemplified in both Etler v. Kertesz and The Assunzione is that the results reached should be independent of the place where the dispute is litigated. As we saw in the discussion of the use of the l.l.c. as the choice of law rule, it is one of the principal purposes of any conflicts analysis to provide rules that are independent of the forum, i.e., the place where the dispute is litigated. Thus it is said that the traditional choice of law rules in conflicts promote uniformity.

8. It will be an important part of our investigation of the choice of law process to examine closely both what value really lies behind the desire for uniform solutions to conflicts cases and how that value can best be achieved. Do you think that the reasoning in either Etler v. Kertesz or The Assunzione would be conducive to uniform results if either case had been litigated in France, Italy, Nova Scotia or Peru rather than in Ontario or England? Would you have much confidence in advising a client with a charterparty problem what the outcome of a dispute might be, if you had to rely only on what was said in The Assunzione?

9. The phrase "closest and most real connection" is an open-ended phrase. It may be quite clear in a large number of cases what law would be chosen by this test. (It is one of the features of the conflict of laws, as it is of any area of the law, that cases that are paradigmatic do not get litigated. The low incidence of conflicts cases - a fact which is true, as we have already stated, in spite of the wealth of cases in the footnotes of all the major texts - is also explained by the instinctive horror most judges and practitioners have for the whole topic. We shall try to convince you that excitement and curiosity rather than horror are more appropriate responses to conflicts cases.) It is equally clear that there will be many cases where the choice can only be made with difficulty. No more precision than you have already seen can be expected with a test like that found in Etler v. Kertesz. You could read thousands of cases and be only a little more likely to be correct in forecasting what result would be reached on any set of facts near the middle of the imaginary spectrum of facts connecting a contract more or less "closely" with two (or more) jurisdictions.

10. You should therefore expect no more certainty and predictability in conflicts than in any other area of the law where the governing principle is expressed in such vague terms. The reasons that prevent any more precision are equally obvious: none of the other tests (summarized in the notes preceding Etler v. Kertesz) that have been suggested are as free from simple contradictory results as the proper law test in its modern formulation. Some of these contradictions were mentioned in the

discussion of those tests. A test like the l.l.c. is suspect because the courts feel that it really is a coincidence whether a contract is made in one jurisdiction rather than another, and that such coincidences should not determine the result of litigation. You must take this last statement as no more than more probably true than not: we shall see very many cases (in part because we specialize in the bizarre and pathological ones) where the result appears to depend on some completely fortuitous event or fact. It is, however, true that the extent to which there appear to be unjustifiable decisions in conflicts is larger than in any other area of the law. The existence of a more significant element of randomness in the results of conflicts cases presents us with one of our most intractable and difficult problems of analysis. Why is this so, and what can we do about it?

11. These concerns may indicate very sketchily the problems that arise from the methods for choosing the law to deal with geographically complex contracts indicated in the cases. The rules found in the cases are generally accepted and can be relied on as the rules that a court will expect to hear when a conflicts argument is presented to it.

12. The next case is a modern example of the English choice of law rules for contracts in the hands of a very competent court. The handling of the rules is as well done here as in any other case that you will find.

> form and language, as a pointer towards English law, without what one would consider as its natural counterweight. I agree that omission of the Lombard Street or Royal Exchange or London clause is insignificant, but I regard the incorporation of the Institute Clauses, with express reference to English law provisions, as important. With no great confidence, and reluctantly differing as to the ultimate conclusion from Bingham J. and Robert Goff L.J., whose reasoning in principle I approve and follow, I have reached the conclusion that English law is the proper law of this particular contract.

The other judges agree with Lord Diplock.

Notes

1. The judgments in the Amin Rasheed case have been reproduced at length for two reasons: (a) the discussion of the choice of law process in contracts is good, and provides an excellent illustration of how that process should be undertaken; and (b) the issue of whether an "international" or "unlocalized" law of contract can or should exist is an important issue to which we shall return. When we do, it will be important to assess carefully the validity of the arguments that Lord Diplock and Lord Wilberforce use to deal with the issue, and we shall have to examine their judgments again. Lords Wilberforce and Diplock are probably the best two judges in the English tradition of the common law of conflicts. As we shall see, it is necessary to separate the English from the American tradition, and this separation can be most fairly done by focussing on what is the best in each tradition.

2. You will have noticed in the cases that we have looked at that frequent references have been made to contracts where the parties have made an express choice of the law to govern their contract. We shall deal with the cases where there is such a clause in the next section.

3. The following statement of the rules offers a convenient summary of the traditional method for dealing with the choice of law problem in contracts set out in the preceding cases, and including those rules where there is an express choice of law clause in the contract.

Dicey & Morris, 10th Ed., 1980

Rule 145:

> The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed,

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Questions and Notes

1. Was it necessary to choose any law to "govern" the contract? Did it matter to the result of the case whichever law was applied?

2. How satisfactory is the restriction on the parties' freedom to choose the law to govern the contract? Lord Wright says, (p. 81 supra) "Connection with English law is not as a matter of principle essential". This statement has led to a lot of debate. It is said that an unrestricted right to choose a law that has no connection with the contract is undesirable. Why should this assumption be made? What factors, as a practical matter, are likely to motivate parties to choose a law to govern their contract? Is it likely that two Canadian parties would choose to have their contract governed by the law of Afghanistan? But if they do so, what does that fact say about the parties themselves? Might it not be that they were both from Afghanistan? If so, why should anyone care if they choose that law? Some of these issue are discussed by John Falconbridge in a case comment on Vita Foods in (1940), 18 Can. Bar Rev. 77.

3. When, in the general law of contracts, are the parties not free to make such deals and on such terms as seem good to them?

4. Conversely, what aspects of the law of contracts are within the parties complete control and what aspects are not?

5. In order to make this question more pointed, consider the following specific situations:

(a) Robin and Chris, both of whom live in Toronto, have been betting for years on the Grey Cup game. One year Robin felt so sure of the result that a bet of $10,000 seemed reasonable. Chris accepted the bet, and in view of its size, both parties wanted it reduced to writing. The following clause was inserted in the agreement:

"This contract is to be governed by the law of Nevada."

Robin lost and is sued by Chris. Robin relies on the Ontario Gaming Act, R.S.O. 1980 c. 183, which makes such contracts unenforceable. By Nevada law the contract is valid. Can Chris recover from Robin?

(b) Sarah is an impecunious second-year law student at one of the common law law schools in Canada. She has a rich aunt, Eleanor. Eleanor wants to help Sarah through law school. Eleanor, therefore, promises to

> pay Sarah $500.00/month until Sarah graduates. Sarah is very concerned about this promise since she fears that a court may regard it as without consideration. She therefore has Eleanor sign a promise to pay which provides that the agreement is to be governed by Québec law. By Québec law a contract is enforceable without consideration. Is the promise binding if Sarah should bring an action in Ontario or any other common law province against Eleanor's executors?

6. In considering this problem, you should beware of over-simplifying the doctrine of consideration in the common law. If a seal renders that doctrine inoperative, why should an express choice of law clause not have similar effect? In other words, what is the justification for the doctrine of consideration? Do you see now why Conflicts throws up problems that land us in some of the most difficult inquiries we may ever have to face. Can you think of a reason that would explain precisely why the issue of consideration appears to be so hard to justify in the context of this simple problem?

7. Nonetheless, Cheshire and North's Private International Law, 10th ed. (London: Butterworths, 1979) at p. 218 states:

> In England and other common-law countries a contract not under seal is void unless supported by consideration. Since requirements of this nature are essential to the creation of a valid contract, the question whether they are binding in a particular instance must be determined by some law independent of the volition of the parties. In the nature of things this can only be the putative proper law, i.e. the law of the country with which the contract, presuming it to be valid, will have the most substantial connexion. [Emphasis added.]

8. What does the phrase, "in the nature of things" mean? Does it mean that the problems of the conflict of laws, or of contracts, are natural phenomena which have their own imperatives like the law of gravity? Does the phrase mean that these problems exist independently of any human mind, and that what we should or should not do is as fixed by natural factors as the rules of hygiene? What scope is left for human choice in what we want to do, or what we think that we should do?

9. As a matter of the law of contract has the author of Cheshire and North got the common law of contract correct? Is it true to say that the requirement of consideration is "essential to the creation of a valid contract"? Review your contracts notes to find out how often the courts enforced contracts (or did something functionally indistinguishable from enforcement) where there was no consideration.

10. Would an appropriately drafted choice of law clause avoid any or all of the following problems:

(a) the doctrine of fundamental breach;

(b) the rule regarding the enforcement of penalties;

(c) the fiduciary obligation of an agent to her principal;

(d) the meaning to be given to a word like "condition";

(e) the availability of relief for mistake or on the grounds of frustration; and

(f) the assignability of a contractual claim.

In considering these issues, do you find any real help from the cases? If you are bothered by other issues, what are those issues? A clue to the last question (it was not meant to be one of those questions where we ask you to tell us what we are thinking) is to ask whether and how far any expression of the parties' agreement avoids, or should be permitted to avoid the rule in question. In other words, if a rule cannot be avoided in a case that does not present geographically complex facts, in what circumstances should a case with such facts permit the rule to be avoided? You may have to review your contracts notes on some of these issues to determine, if you cannot remember, just what lies beind some of the rules we have mentioned.

11. These questions can in one sense be seen as requiring a process of exegesis of the passage from Lord Wright's judgment in Vita Foods where he says that the choice of law made by the parties will be effective if "bona fide and legal and not contrary to public policy".

12. Does the comment from Cheshire and North help in understanding this issue? Suppose one were to say that a choice of law clause had as much, but no more effect than any other clause in a contract, would that statement avoid the problems of Questions 3, 4, 5 and 10.

13. McLeod, The Conflict of Laws, (Calgary: Carswell Legal Publications, 1983) p. 488 states the following rule:

Formation.

Rule 152: The formation of a contract, and the prerequisites necessary thereto, are governed by the putative proper law of the contract.

The rules of formation are said to be the rules governing offer and acceptance and consideration. McLeod states, "in Anglo-Canadian law, consideration is a necessary prerequisite to the validity of all contracts not under seal". The "putative proper law" is the proper law that would apply if the contract were validly made. McLeod's view of the putative proper law is based on that of Dicey & Morris (supra p. 74, Rule 146) as opposed to that of Cheshire & North, and he appears to accept the view that would permit the parties by a suitably drafted choice of law clause to avoid the doctrine of consideration, though his view on this issue is not completely clear.

14. It is also unclear how far the parties' freedom to select the proper law extends to the other issues mentioned in Q. **10**. McLeod refers to the case, Albeko Schuhmaschinen v. Kamborian Shoe Machine Co. Ltd. (1961), 111 L.J. 519 (Q.B.D.) where the issue was whether the English or Swiss postal acceptance rule applied. (Swiss law puts the risk of loss in the mail on the offeree, and requires that the acceptance reach the offeror for there to be a contract.) The judge held that the Swiss rule applied as the putative proper law, so that there was no valid contract. Does it, or should it matter what the function of the postal acceptance rule is?

15. For an evaluation of what effect ought to be given to an express choice of law to govern a contract, see Reese, "Choice of Law in Torts and Contracts and Directions for the Future" (1977), 16 Columbia Journal of Transnational Law 1, at pp. 21- 26, and Note, "Effectiveness of Choice-of-Law Clause in Contracts Conflicts of Law: Party Autonomy or Objective Determination" (1982), 82 Col. L. Rev. 1659. These articles, being written from the American perspective, present ideas for the solution of conflicts problems that we have not yet dealt with, and while it might be less confusing to postpone any investigation of them until later in the course, they may still be useful in helping you to understand a set of ideas which the Anglo-Canadian writers have not elucidated. We mention these references now so that all the references on the issue of party autonomy are in one place.

16. Choice of Law clauses are often standard "boiler-plate" in contracts drafted by Canadian lawyers. There has been very little litigation over such clauses. An express choice of New York law in a student loan agreement was enforced in Long Island University v. Morton (1978), 27 N.S.R (2d) 213, 41 A.P.R. 213, 81 D.L.R. (3d) 392 (N.S. Co. Ct.). See also, Nike Infomatic Systems Ltd. v. Avac Systems Ltd., [1980] 1 W.W.R. 528, 105 D.L.R. (3d) 455 (B.C.S.C.). The clause in the first of these cases reads:

> The maker hereby expressly waives the defense of the Statute of Limitations, and all other defenses arising out of any lack of diligence in enforcing the payment thereof ... and, the laws of the State of New York shall govern this note.

The clause in the latter reads:

> This agreement is to be governed by and construed according to the laws of the Province of B.C. If, however, any provision in anywise contravenes the laws of any state or jurisdiction where this agreement is to be performed, such provision shall be deemed not to be a part of this agreement therein.

17. It was dimly seen in Vita Foods that some restrictions must be placed on the parties' power to choose the "governing law" if that choice is to determine every aspect of the contract's validity and enforcement. In other words, if you consider the range of matters over which the proper law has "control" in the formulation of Dicey and Morris, or in that of Lord Wilberforce in Amin Rasheed, does it follow that the parties cannot, for example, choose a law to avoid a provision of some other law designed to protect minors? As you will remember, the proviso stated in Vita Foods was that the choice must be "bona fide and legal", and not contrary to "public policy". We could translate the phrase "bona fide" as incorporating an idea like unconscionability: the choice must not be slipped into a contract to catch one party by unfair surprise. It is unclear what the word "legal" denotes. It would seem to have either a reflexive function - what's legal is legal is legal... - or none that provides any help in knowing how far the parties are free to choose the law to govern their relation. The phrase "public policy" has more content but is a phrase that has to be treated very carefully. As used by Lord Wright in Vita Foods, the phrase probably means that the choice must not be an attempt to avoid an argument that the whole deal stinks and is one that no English court would ever consider. Just as no court will enforce a contract to murder someone (even if the plaintiff has fully performed his or her obligations under the contract), so too it will not enforce a contract that is offensive to the court even though the parties may have chosen a law by which the contract would be valid and enforceable.

18. It is not easy to find or even to think of examples of such contracts now, but one area that might raise the problem would be contracts where a woman agrees for a fee to have a child by the male partner of a couple who would otherwise be childless. One jurisdiction might regard the enforcement of such contracts as being contrary to public policy, either on the grounds that they might involve adultery or fornication, or because they might contribute to the exploitation of poor women. The result of such

a conclusion would be the dismissal of a claim either for the promised payment or for the child. (How far a claim based on unjust enrichment would succeed may be another matter.) Some other jurisdiction may regard such contracts as unobjectionable in general, though possibly subject to some controls, and in such a jurisdiction a claim for the promised payment (if not for the child) may well be enforceable.

Some Further Problems of Choice of Law in Contracts

1. The following cases deal with the problem of explicating the limits on the parties' implied or express choice of law. The cases are not good examples of an attempt to deal with the problems that they raise, but they are fairly typical examples both of the traditional approach to the problems of the conflict of laws, and of the problems raised in deciding how far the parties (or, more usually one of them) can avoid the application of laws that they do not like. Good cases on these issues are not easy to find. The explanation of this fact is probably the same in conflicts cases as in other areas of the law: parties seldom are anxious to have a judge look at what they are not very proud of.

2. The principal problem raised by all the cases in this section is their value as indicating what the courts might do in a similar case in the future. You should consider carefully the extent to which you could safely rely on the "rules" (though it is stretching things a bit to refer to what the courts say in these cases as generating any rules of any kind) that seem to be established by the courts.

3. A more important and more difficult inquiry is to consider the impact of the courts' decisions, not on the development of conflicts rules, but on the domestic rules of the courts' own jurisdictions. One fact of prime importance in most of the cases we shall examine is that the court that is asked to determine the applicability of the statute in each case is the court of the jurisdiction that passed the statute. Neither case is like Etler v. Kertesz and The Assunzione where the court had, or might have had to apply the law of another jurisdiction. In terms of the proof of foreign law, in neither of the two cases that follow does the law decided to be applicable have to be proved by expert evidence.

4. The importance of the point made in the previous paragraph derives from the following argument:

> (a) The process of interpretation of any rule of law, whether its origin is statutory or found in the common law, will indicate that there are cases clearly within (or equally clearly outside) the rule - what we can call paradigm cases - and cases that must be much more carefully considered: the marginal cases. A case will usually be a marginal case because it is unclear whether the statute was meant to apply to it or not.
>
> (b) An excellent example of such marginal cases, and of the courts' approach to the problems that they create is

provided by the judgment of the Ontario Court of Appeal in Reference Re Certain Titles to Land in Ontario, [1973] 2 O.R. 613, 35 D.L.R. (3d) 10. The court held, more or less in the teeth of the statute, that the provisions making the purchase of land void where compliance with the Planning Act, R.S.O. 1960, c. 296 (as amended) could not be shown, did not apply to "bona fide" purchasers. The decision of the court has the effect of drawing a line so far as the application of the statute is concerned between those who are "bona fide" purchasers of land and those who are not. In other words, the degree of "bona fide-ness" of the purchaser will determine whether the statute applies or not. The question cannot be one that resembles an on/off switch, but one that is more like a graduated scale: at either end there are the paradigm cases, either clearly within the statute, or clearly outside it, and in the middle are the problem ones.

(c) The Ontario Court justified its conclusion that the Planning Act did not apply to "bona fide" purchasers on the ground that the purpose of the act would not be forwarded by its application to such cases: what purpose is served by denying title to those who had no idea that compliance with the Planning Act was required? When the application of a statutory rule is determined by the degree of foreign-ness of the facts of the case, we must assume (unless the statute has no purpose, and we cannot accept this fact since it borders on being a contradiction in terms) that the decision not to apply the act to a case with a certain amount of foreign-ness forwards the purpose of the statute. The decision of the House of Lords in Amin Rasheed on the "discretion point" is an example of such a case. The House held that the foreign facts were so extensive that it would be appropriate not to allow the case to be brought in England. The degree of "foreign-ness" of a case may have a similar effect on the problem of applying other statutes. Certain provisions of the Income Tax Act apply to those "resident" in Canada. There are very many cases determining who is or is not resident in Canada for the purpose of that act. The decision whether to hold a taxpayer liable under these provisions will depend on the degree of foreign-ness of the taxpayer, determined with reference to the concept of residence.

(d) Just as there is a limitation on the scope of a statute when, for example, it is held not to apply to bona fide purchasers of land, so too there is a limitation imposed when it is held not to apply by reason of the foreign facts in a case. If we justify the limitation in each case on the

ground that its imposition forwards the purpose of the statute, we can infer from the mere creation of the limitation some facts about the court's view of the statute's purpose. This inference cannot be anything other than a general statement made by the court of how the statute will be applied in the future. This process of reasoning about the purpose of statutes applies, of course, to any rule of law, statutory or common law, and is one of the most familiar features of the common law system.

5. The consequences of the argument that has just been made are more frequently ignored than not in the consideration of conflicts cases. (Why this fact should exist here and nowhere else is one of the consequences of the view of conflicts that it is a special area of the law with its own arcane rules and its general aura of mysticism and baffling complexity.) The two cases that follow raise this problem. They force us to decide what purpose the court saw for the domestic statutory rule as it dealt with the decision whether to apply the rule to a case of geographical complexity. That purpose **MUST**, if the law is to have any element of rationality about it, be relevant in a wholly domestic case involving the same statute.

6. Our task is to consider how the court in each case can avoid the consequences arising from the fact that its decision in the case of geographically complex facts indicates a view of the purpose of the statute that will make its application in any subsequent case, including any wholly domestic case, very hard to justify. In other words, in each case the court seems to have adopted a purpose for the statute that makes it largely inapplicable to <u>any</u> case, with or without geographically complex facts, arising in the future. If the court is unlikely to accept this consequence, as is probable, then we have to re-consider whether the failure of the court to apply the statute in the case with geographically complex facts can be justified. In essence this argument is that cases of geographically complex facts can be no different from any other case, both in the guidance they provide on what factors the court will consider as relevant to the decision to apply a statute or not, and on the purposes that the court sees for the statute.

7. This argument applies **ONLY** in those cases where the court that is asked to resolve a dispute by reference to a particular statute is also the court of the jurisdiction whose legislative body passed the statute. In these cases the court can take judicial notice of the statute, and has no need to use either expert evidence of a foreign law or the extended powers given by some of the provincial <u>Evidence Acts</u> that were set out earlier.

Questions and Notes:

1. Suppose that the judgment of MacDonald, J. were accepted on the conflicts issue, viz, that the applicability of the Alberta legislation could be determined by the normal choice of law rules. Does it follow that the parties could have provided that the law of Ontario should govern their contract, and that the court would then have enforced the agreement?

2. If that had happened, what would that conclusion say about the scope and purpose of the Alberta act?

3. In view of the court's decision on the applicability of the act, was there any choice of law issue raised by the case? In other words, and now ignoring the premise of Q. 1, did it matter, or could it have matter what law the parties chose?

4. As a matter of the law of contract it is odd, is it not, that the parties would choose to have their contract governed by a law that would make it invalid? Can you imagine any plausible reason (aside from simple ignorance of the law) why two people would make any kind of deal in these circumstances?

5. Do you think that the court gave enough consideration to the problem of the interpretation of the legislation? Is it absolutely inevitable that the agreement has to be considered as being within the statute?

6. In R. v. Sutcliffe Agencies Ltd. (1980), 17 R.P.R. 245 (Man. C.A.), a real estate agent, who was licensed in Ontario, and who had a listing of land in Ontario, was approached by a Manitoba resident who wanted to purchase the land. The agent took the agreement of purchase and sale to Winnipeg where the purchaser signed the agreement. The agent was prosecuted in Manitoba for acting as a real estate agent without a Manitoba licence. What the agent did was held to be a violation of the Real Estate Brokers Act, R.S.M. 1970, c. R. 20, and a conviction of the agent for "negotiating" a sale in Manitoba without being licensed to do so was upheld.

7. The Guarantees Acknowledgement Act, R.S.A. 1970, c. 163 requires that a person attend before a notary public to acknowledge his guarantee before it is enforceable against him. Should this requirement be displaced by a provision in the contract of guarantee that it "shall be construed in accordance with the laws of the province of Ontario", where no such requirement exists?

8. This issue was raised in Greenshields Inc. v. Johnston (1981), 119 D.L.R. (3d) 714 (Alta. S.C.); aff'd (1981), 131 D.L.R. (3d) 234 (Alta. C.A.). The court assumed that "construed in accordance with" was the same as "governed by". The guarantee

was signed by an Alberta defendant in order to guarantee a debt which arose in Alberta. The choice of Ontario law was held to be bona fide and legal, and the defendant admitted that he understood the nature of the document. The facts that the head office of the plaintiff company was in Ontario and that orders and confirmation vouchers were processed through the Toronto office of the plaintiff provided a sufficient connection with Ontario to indicate that the clause was not inserted in order to evade the Alberta statute. The law of Ontario was found to be the proper law of the contract and the guarantee was, then, upheld.

9. See also: Bank of Montreal v. Snoxell (1982), 143 D.L.R. (3d) 349 (Alta. Q.B.), where again the Alberta act was eviscerated. In Lehndorf Property Management Ltd. v. McGrath et al. [1984] 3 W.W.R. 187 (B.C.S.C.) parties in British Columbia made the mistake of executing a guarantee which contained a clause stating it should be governed by the laws of Alberta, and of course they made no effort to comply with Alberta's Guarantees Acknowledgement Act. The B.C. court granted the parties' wish and held the guarantee invalid. Is this result something that one would expect from a body of rules ostensibly dealing with an aspect of the law of contract?

10. Note that in both Greenshields and Snoxell the court making the determination of the applicability of the Alberta act was an Alberta court. That court can make an authoritative decision on the applicability of an Alberta act in a way that no other provincial court can. The Supreme Court of Canada, should it hear an appeal from an Alberta court on the same issue as that raised in Greenshields or Snoxell, would be acting as an Alberta court, and could make an authoritative decision on Alberta law.

11. The following additional facts in Etler v. Kertesz might be relevant:

Article VIII(2)(b) of the Bretton Woods Agreement - The Constitution of the International Monetary Fund - states:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member.

The Bretton Woods Agreement Act, R.S.C. 1970, c. B-9, s.3 states:

> On and after the 27th day of December 1945, the first sentence of paragraph 2(b) of Article VIII of the Agreement set out in the First Schedule has the force of law in Canada.

If Austria were a member of the International Monetary Fund at either the date of the loan or the date of the trial, should this fact influence the court? Would it matter if Austria were not?

Review and Further Examination of Typical Cases

If we now review the cases that we have considered and summarize the rules and principles that we can derive from them, we could produce an outline of the choice of law process (keeping in mind that it is only one of three issues that might arise in a case with geographically complex facts, the other two being Jurisdiction and the Recognition and Enforcement of Foreign Judgments) something like this:

1. The applicability of the contracts choice of law rule (in any formulation) depends on the characterization of the question before the court as one involving the law of contracts

2. The choice of law rule to govern cases that are characterized as contracts cases is that the contract is to be governed by its proper law. The phrase "proper law" has been variously defined as being the law of the place where the contract was made; the law intended by the parties to govern their contract, such intention being either inferred from the agreement or expressed in it; or the system of law with which the contract has its "closest and most real connection".

3. Where the court finds that the parties have made an express choice of the law to govern their contracts, that choice will normally be given effect to provided that it is "bona fide and legal and not contrary to public policy".

4. Where there has been no law expressly chosen by the parties, the contract will be governed by that system of law with which the contract has its closest and most real connection. The application of this test involves the consideration of all of the aspects of the contract: its making, the place of its making, the nature of the parties, the subject-matter of the contract, the place of performance, its terms and the origin of those terms.

5. (a) The use of the word "governed" may be taken to mean that all aspects of the contract - its validity, enforceability, its legality (possibly), its interpretation - are to be decided with reference to the proper law.

   (b) The choice of law process or method does not focus on the content of the possibly competing systems but solely on whether one system of law or the other governs the contract.

6. All contracts must be "localized" with one system of law in the world; there cannot be an "unlocalized" contract, finding its

force in some modern equivalent of the law merchant of the Middle Ages.

7. The next four cases are further examples of the choice of law process in Contracts. As you read them, consider how far they provide evidence that the use of the choice of law rules we have been considering would,

(a) be applied uniformly by each of the concerned jurisdictions (or any other jurisdiction),

(b) give useful guidance to subsequent courts, and

(c) be generally accepted because any court anywhere would see these issues as contracts issues, i.e., the characterization process would lead to the same result in any court.

Notes

1. The choice of law process in Bondholders v. Manville is exactly the same as that which we have been examining. The only difference is in the formulation of the rule. Bondholders is the case that applied the old rule that the choice of law rule to govern contracts is the law of the place of making. It differs from Etler v. Kertesz in the formulation of the choice of law rule, but the process of reasoning to the result fits exactly within the outline in Table 1.

2. The kinds of questions with which we have been concerned so far have taken the validity of the choice of law process illustrated in the cases very much for granted. We have not considered whether it might be seriously or fundamentally flawed. Nothing as important as the process outlined in the preceding cases can be taken for granted. To begin a more radical assessment of the process we can usefully ask two questions that arise out of Bondholders v. Manville.

> (a) Was any purpose served by applying the foreign law? That is, were any policies, conceived by Florida law or by Saskatchewan law as relevant to an action on a contract, advanced by the decision?
>
> (b) Was there a good reason to depart from domestic legal policy regarding contracts, viz., that bargains are enforced in the absence of strong reasons to the contrary.

3. The problems of married women's contracts as a separate problem of the law, are now no longer with us: everyone being equally free to put herself or himself into the lion's jaws and to hope, sometimes against all the evidence to the contrary that the lion will be a merciful lion. (See. Llewellyn, The Common Law Tradition. (New York: Little, Brown and Company, 1960) pp. 362,363.) For a discussion of married women's contracts in conflicts cases, see B. Currie, Selected Essays on the Conflicts of Laws (Durham, N.C.: Duke U.P., 1963) pp. 77-127.

Notes:

1. The case of Charron v. Montreal Trust raises a fundamental problem of the conflict of laws, one that we shall examine in more detail later in the course, particularly in the context of matrimonial property and succession.

2. Consider what the result in Charron would have been in the issue in the case (the right of the wife to claim the arrears of maintenance under the separation agreement from her deceased's husband's estate had been characterized as a "succession case". If that characterization had been made, the choice of law rule would have been that the law of the deceased's domicile at the date of his death governed the analysis.

3. On the assumption that the husband left an estate of $50,000, and that half went to his wife because of the application of the Québec rules regarding matrimonial property, the other half, we can assume, going either to the children of the marriage or being disposed of by the husband by will, calculate the absolute amounts that the wife and any other beneficiary would get under (i) the result of the case, and (ii) if Québec law had been held to apply.

4. Now calculate what the wife would have obtained if the whole estate and every question of succession were governed by Ontario law.

5. What do these results suggest about the justification for the decision of the Ontario Court of Appeal?

Notes:

1. There have been a great many cases dealing with problems similar to that in Colmenares. Many have involved life insurance companies that issued policies in Cuba before Castro came to power. Those who bought such policies were likely to be people who would not sympathise with the Castro regime, and who, therefore were often emigrés from Cuba. Such people would be understandably anxious to obtain any assets wherever they could be found. Actions were brought against life insurance companies not only in Ontario (where many companies have their head offices), but in many American states. We shall look at the American solution to the problem later.

2. In Arnoldson v. Confederation Life Association (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641 (C.A.), a plaintiff in much the same position as the plaintiff in Colmenares was defeated because the policy provided that "All payments... shall be made in the City of Havana, Republic of Cuba". Read any policies of life insurance that you might have and see where you may claim the proceeds. Do you think that Señor Arnoldson was surprised to find that his policy was worthless to him? The case, like Colmenares, is absolutely devoid of any analysis of the contracts issues involved in standard form contracts, of any argument that the plaintiff might have been caught by unfair surprise, or that sneaking in the clause might have been unconscionable.

3. British Columbia's Insurance Act, R.S.B.C. 1979, c. 200, s. 7 reads: "A contract insuring a person domiciled or resident in the Province at the date of it, or the subject matter of which is property or any interest in property situated in the Province, shall be deemed to be made in the Province and shall be construed accordingly." Given what Colmenares says about the significance of the place of contract does this provision mean that all insurance contracts for B.C. residents are governed by the law of that province? What if the parties should stipulate for another province's law? What if the policy should contain a clause like that found in Arnoldson?

Notes and Questions:

1. To what extent can the decision of the Court of Appeal be seen as simply a decision on the English law of frustration?

2. Is the approach of the Supreme Court of Canada in Colmenares consistent with that of the Court of Appeal in Ralli Bros? The judgments in the latter case focus on the allocation of the risks created by supervening illegality. Does the focus on the proper law in the former case deal (except incidentally) with the question of the allocation of the risk of supervening illegality?

3. Does the different contract term in Arnoldson justify a different result? In other words, if the risk in Colmenares is on the insurer, should the changed wording in Arnoldson be regarded as sufficient notice to the insured that the risk should now be differently allocated?

4. On whom should the risk fall in each of these cases? What factors do you consider sufficient to justify the conclusion that you have reached?